

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1905.

No. 1509.

WINFIELD SCOTT MONTGOMERY, APPELLANT,

vs.

RICHARD H. BROWN AND CORA L. PETERS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

WINFIELD SCOTT MONTGOMERY, Appellant, }
vs. } No. 1509.
RICHARD H. BROWN ET AL. }

a Supreme Court of the District of Columbia.

WINFIELD SCOTT MONTGOMERY, Complainant, }
vs. } No. 24060. In
RICHARD H. BROWN and CORA L. PETERS, De- } Equity.
fendants. }

UNITED STATES OF AMERICA, } ss :
District of Columbia, }

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit :—

1 *Bill for Construction of Will, etc.*

Filed June 29, 1903.

In the Supreme Court of the District of Columbia.

WINFIELD SCOTT MONTGOMERY, Complainant, }
vs. } Equity. No. 24060.
RICHARD H. BROWN and CORA L. PETERS, }
Defendants. }

The complainant, Winfield Scott Montgomery, respectfully shows to the court and states :

1. That he is a citizen of the United States and a resident of the District of Columbia, and brings this suit in his own right, as well as in his right as the surviving executor of Henry P. Montgomery, late of said District, deceased.

2. That the defendant Cora L. Peters is a citizen of the United States, a resident of said District, and is sued in her own right as one of the next of kin and heirs at law of Emma V. Montgomery,

late of said District, deceased; that the defendant Richard H. Brown is a citizen of the United States, and a resident of the city of Denver, Colorado, but temporarily resident in said District, and is sued as administrator of the estate of said Emma V. Montgomery, as well as in his own right as one of her next of kin and heirs at law.

2 3. That heretofore, to wit, on April 26, 1899, the said Henry P. Montgomery of said District died therein, without having had any child, and leaving said Emma V. Montgomery his widow, and leaving this complainant his only heir at law and next of kin, and leaving a last will and testament, dated December 1, 1898, with a codicil dated the — day of —, 1899, which was, on or about June 2, 1899, duly admitted to probate and record by this honorable court holding a special term for orphans' court business; and on June 5, 1899, letters testamentary thereon were granted unto said Emma V. Montgomery and this complainant, the executors appointed by said will, and they duly qualified and acted as such executors as will more fully appear by a reference to a copy of said will, the probate thereof and the granting of letters testamentary certified by the register of wills, filed herewith, marked "Complainant's Exhibit A" and prayed to be made and read as part hereof.

4. The part of said will deemed most pertinent to the purposes of this bill is as follows:

"* * * after my debts and funeral charges are paid I devise and bequeath as follows: To my beloved and devoted wife, Emma V. Montgomery, all of my real estate during her life with power to mortgage, should her circumstances become such as to justify it. I also bequeath to my wife, Emma V. Montgomery, my life insurance and all other property, not otherwise disposed of by this will. * * * At the death of my wife, Emma V. Montgomery, all of my property, real, personal and mixed, shall revert to my brother Winfield Scott Montgomery and his heirs forever."

3 The other legacies left by said will and codicil are the professional books of the testator bequeathed to Musette Brooks, the sum of two hundred dollars (\$200), his gold watch and chain, and Duruy's History of Rome, bequeathed to this complainant in trust for Wilder P. Montgomery, the testator's nephew, and son of this complainant, which said legacies were duly paid and discharged.

5. The debts and funeral expenses of said testator amounted to less than three hundred dollars (\$300) and were duly paid.

The insurance on the life of said testator, and mentioned in his will, amounted to five thousand dollars (\$5000) which sum was collected and paid over to said Emma V. Montgomery, and she used and enjoyed the income thereof up to the time of her decease.

The real estate named in, and which was devised by said will, consisted, chiefly, of the house and lot occupied by the testator as a

residence, and which said Emma V. Montgomery continued to so occupy until her decease.

6. The said Emma V. Montgomery departed this life October 26, 1902, leaving the defendants as her only heirs at law and next of kin.

On or about November 13, 1902, the defendant Richard H. Brown filed in this honorable court holding a special term as a probate court, his petition setting forth the death of said Emma V. Montgomery, intestate, seized and possessed of real and personal property, and that such personal property amounted to about six thousand dollars (\$6000), consisting of money in bank, secured
4 notes, stock and household effects, and that her debts and funeral expenses amounted to not over two hundred and fifty dollars.

Thereupon, November 18, 1902, this complainant filed in said court and proceedings his statement, or intervening petition for the purpose of advising the court of his claim and contention as to the personal property which said Emma V. Montgomery received under the will of said Henry P. Montgomery, namely, that she only took an estate for life therein, and that, at her death, the same passed to and became the property of this complainant under and by the terms of said will.

It was, among other things, set forth in said intervening petition, and this complainant now avers, that said Emma V. Montgomery, at the date of her decease, left undisposed of the furniture, fixtures and personal effects which she took under said will, and which were in his residence at the time of said testator's decease, and so remained at the time of hers; that of the five thousand dollars life insurance which she received from the personal estate of said Henry P. Montgomery she invested \$3500 in a loan to one Schneider and took his note therefor secured by a deed of trust on real estate in this city, which then remained unpaid, and that she also invested the further sum of \$1000 of said life insurance money in another note secured by deed of trust on real estate, which also remained unpaid, and averred and claimed, and, now avers and claims, that said personal
5 property and choses in action, as well as all other personal property which she received under said will passed at her death to and became the property of this complainant, and representing to the court that there should be a full discovery as to what the personal property left by said Emma V. Montgomery consisted of and an inquiry as to what part thereof belonged to this complainant, and that, if the court should deem best, a collector be appointed to collect and take charge of the assets of said estate in the meantime; which intervening petition remains on file in said proceedings in said probate court In the matter of the estate of Emma V. Montgomery, No. 11121, reference to which is hereby prayed.

7. On November 28, 1902, said Richard H. Brown was, by the justice holding said court, appointed administrator of the estate of said Emma V. Montgomery, and on or about December 5, 1902, he

filed therein an inventory and appraisal of her personal estate, showing the same to consist of money on deposit in bank	
and on decedent's person to the amount of.....	\$1244.02
10 shares of stock of Columbia Title Insurance Co.....	45.00
Note drawn by John A. Schneider, dated Feb. 27, 1900, payable at 5 years after date, interest at $4\frac{1}{2}$ per cent., semi-annually, secured by deed of trust on lot 171, square 156 for.....	3 500.00
Two notes drawn by Annie Louise Terrell, Hester V. Johnson and Wm. Terrell, for \$500 each, dated March 10, 1900, payable 4 years after date, interest at 6% per cent., semi-annually, secured by deed of trust on lot 20, square 110, for.....	1000.00
Note drawn by John N. Polham dated May 29, 1896, payable at 3 years after date, interest 6 per cent.	
6 per annum, semi-annually, secured by deed of trust on lots 195 and 196, square 1257 for.....	1000.00
Household effects \$182.95, jewelry \$102.50.....	285.45
Making	<u>7074.57</u>

Said inventory also shows debts due to the estate from the defendant Cora L. Peters amounting to \$350 and that the debts and funeral expenses of decedent amounted to \$250.

This complainant avers that said Emma V. Montgomery obtained said above-named note for \$3500, and said two notes for \$500 each, by investing therein \$4500 of the money received by her under said will as the life insurance therein mentioned, and that it should go to this complainant at her death, according to the terms and intention of said will; and he believes the same to be true in regard to a part of the money kept by her on deposit in bank.

8. This complainant claims and contends that under the terms of said will of Henry P. Montgomery the interest, or estate which said Emma V. Montgomery took in the personal property received by her thereunder was not an absolute one, but only an interest or estate for and during her life, and that at her death the same passed to and became the property of this complainant; while the defendants claim and contend that the interest and estate which she took in said personal property, under said will, was absolute and free from limitation, and that this complainant took, and has, no interest whatever therein, and said defendant Richard H. Brown, as
7 administrator, refuses to recognize or protect the rights of complainant as to said personal property; and the complainant fears that, being a non resident, he the said Brown, may take the same beyond the jurisdiction of this court, or dispose thereof, unless enjoined from so doing.

9. This complainant avers and represents that he has no adequate remedy at law and that without the intervention of this court of

equity he will be remediless and suffer great loss and injury in the premises.

Wherefore this complainant prays as follows:

First. That the process of subpoena may issue out of and under the seal of this court commanding said defendants, Richard H. Brown and Cora L. Peters, to appear at a time therein named and answer the exigencies of this bill.

Second. That the court will, by proper decree, construe and interpret said will of Henry P. Montgomery upon the points and in respect of the matters hereinbefore set forth so as to determine the respective rights of the complainant and defendants thereunder.

Third. That the court will decree and direct that the defendant Richard H. Brown, as administrator as aforesaid, shall transfer and deliver to this complainant the note of \$3500 drawn by John A. Schneider, and the two notes for \$500, each, drawn by Annie Louise Terrell, and others, hereinbefore described, with the securities held for the same, and accrued interest thereon since the death of said Emma V. Montgomery, and also whatever further money or effects

8 shall be found by the court to have been received by him and belonging to this complainant and that he be enjoined and restrained from distributing or disposing of the same until the final determination of this cause, and that, if it shall seem best, or necessary, a receiver be appointed to take charge of and preserve the same during the pendency hereof.

Fourth. That this complainant may have such other or further relief in the premises as the nature of his case may require and as to the court shall seem meet.

WINFIELD SCOTT MONTGOMERY.

C. C. COLE,
R. G. DONALDSON,
S. R. BOND,
Complainant's Solicitors.

DISTRICT OF COLUMBIA, ss:

I, Winfield Scott Montgomery, do solemnly swear that I have read the bill by me above subscribed and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and those stated upon information and belief I believe to be true.

WINFIELD SCOTT MONTGOMERY.

Subscribed and sworn to before me this 27th day of June, 1903.

CHAS. H. BAUMAN,
Notary Public, D. of C.

[NOTARIAL SEAL.]

Filed Oct. 5, 1903.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

DISTRICT OF COLUMBIA, *To wit* :

The United States of America to all persons to whom these presents shall come, Greeting :

Know ye, that the last will and testament of Henry P. Montgomery, of the District of Columbia, deceased, hath in due form of law been exhibited, proved, and recorded in the office of the register of wills for the District of Columbia, a copy of which is to these presents annexed, and administration of all the goods, chattels, and credits of the deceased, is hereby granted and committed unto Emma V. Montgomery and Winfield S. Montgomery, the executors by the said will appointed.

Witness, Andrew C. Bradley, justice holding the special term of the said supreme court for orphans' court business, this 5th day of June, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

Test :

[SEAL.]

J. NOTA MCGILL,
Register of Wills for the District of Columbia.

We, Emma V. Montgomery and Winfield S. Montgomery, do swear that we will well and truly administer the goods, chattels, personal estate, and credits of Henry P. Montgomery, late
10 of the District of Columbia, deceased, to the best of our knowledge, according to law, and will give a just account of our administration when thereto we shall be lawfully called. So help us God.

EMMA V. MONTGOMERY.
WINFIELD S. MONTGOMERY.

Sworn and subscribed to before me, this 5th day of June, A. D. 1899.

Test :

J. NOTA MCGILL,
Register of Wills.

Last Will and Testament.

In the name of God, amen.

I, Henry P. Montgomery, of the District of Columbia, being of sound and disposing mind, memory, and understanding, considering

the certainty of death, and the uncertainty of the time thereof, and being desirous to settle my worldly affairs, and thereby being the better prepared to leave this world when it shall please God to call me hence, do therefore make and publish this my last will and testament, in manner and form following, that is to say :

First and principally, I commit my soul into the hands of Almighty God, and my body to the earth, to be decently buried, and after my debts and funeral charges are paid, I devise and
11 bequeath as follows :

To my beloved and devoted wife, Emma V. Montgomery, all my real estate during her life with power to mortgage, should her circumstances become such as to justify it. I also bequeath to my wife, Emma V. Montgomery, my life insurance and all other property, not otherwise disposed of by this will.

To Richard B. Peters, in consideration of his great kindness to me, I bequeath the sum of one hundred dollars.

To my faithful friend and ever ready assistant, Musette Brooks, I bequeath my professional books.

At the death of my, wife, Emma V. Montgomery, all of my property real, personal, and mixed, shall revert to my brother, Winfield Scott Montgomery and his heirs forever.

This will revokes all previous wills made by me.

And lastly, I do hereby constitute and appoint Emma V. Montgomery and Winfield Scott Montgomery to be executors, without bond, of this my last will and testament, revoking and annulling all former wills by me heretofore made, ratifying and confirming this and none other, to be my last will and testament.

In testimony whereof, I have set my hand to this, my last will and testament, at Washington, D. C., this first day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

HENRY P. MONTGOMERY.

12 The foregoing instrument was signed by the said Henry P. Montgomery in our presence, and by him published and declared as and for his last will and testament, and at his request, and in our presence, and in the presence of each other, we hereunto subscribe our names as attending witnesses, at Washington, D. C., this first day of December, A. D. 1898.

J. A. JOHNSON,
Resides at Washington, D. C.

G. F. T. COOK,
Resides at Washington, D. C.

J. W. F. SMITH,
Resides at Washington, D. C.

I, Henry P. Montgomery, of Washington, D. C., being of sound and disposing mind, memory and understanding, do hereby make, declare and publish this CODICIL to my last will and testament, ex-

ecuted and published on the first day of December A. D. 1898, in manner following, that is to say:

First. I revoke the bequest, in my said will and testament, to Richard B. Peters, of the sum of one hundred (100) dollars.

Second. I give and bequeath to my brother, W. S. Montgomery, in trust for my nephew Wilder P. Montgomery, in acknowledgment of his faithful and intelligent services rendered me during my illness, the following, to wit: Two hundred (200) dollars, my gold watch, my gold chain and, of my library, Duruy's History of Rome, 16 volumes. I direct that the two hundred (200) dollars herein bequeathed in trust for Wilder P. Montgomery be used in aiding him, upon entrance upon a college course of study, in pursuing it to the 13-18 completion thereof.

Third. I do hereby ratify and confirm my said will and testament in all other respects.

In witness whereof, I have hereunto set my hand and seal, this — day of — in the year of our Lord one thousand eight hundred ninety-nine.

HENRY P. MONTGOMERY. [SEAL.]

Signed and sealed by the said Henry P. Montgomery in our presence and by him declared and published as and for his last will and testament, and at his request and in our presence, and in the presence of each other, we hereunto subscribe our names as witnesses, at Washington, District of Columbia, this — day of — A. D. 1899.

W. W. McCARY,

Residence, 1812½ 11 St., Washington, D. C.

H. C. BRUCE,

Residence, 1926 11 St., Washington, D. C.

EDGAR BECKLEY,

Residence, 1926 11th — N. W., Washington, D. C.

19

Answer of Defendants.

Filed July 23, 1903.

In the Supreme Court of the District of Columbia.

Title of Cause.

The Joint and Several Answer of the Defendants to the Bill of Complaint in the Above Entitled Cause.

The said defendants now and at all times hereafter saving and reserving to themselves, and each of themselves, all and all manner of benefit of exception that can or may be taken to the many errors, uncertainties and imperfections in the said bill of complaint con-

tained, nevertheless, for answer thereunto or unto so much and such parts thereof as they are advised it is material and necessary for them to answer, answering say.

1. They admit the allegations of the first paragraph of the said bill to be true.

2. They admit the allegations of the second paragraph of the said bill to be true.

3. They admit the allegations of the third paragraph of the said bill to be true, except the allegation therein made that the certain Henry

20 P. Montgomery therein mentioned left the complainant as his only heir at law and next of kin, which excepted allegation they deny and, on the contrary, and on information and belief, aver that besides the said complainant the said Henry P. Montgomery left other next of kin and heirs at law, namely, brothers and sisters; and except also the allegation of the said paragraph that a copy of the will of the said Henry P. Montgomery and of the probate thereof and granting of letters testamentary thereon is filed with the said bill, which further excepted allegation they also deny.

4. They admit the allegations of the fourth paragraph of the said bill to be true, except as hereinafter in this answer appearing, but for greater certainty as to the allegations of the said paragraph touching the last will of the said Henry P. Montgomery they attach hereto, marked Exhibit A, and pray to be taken as part hereof, a true copy of the last will and codicil of the said Henry P. Montgomery.

5. They admit that, as alleged in the fifth paragraph of the said bill, the debts and funeral expenses of the said testator were paid, but for further answer to this allegation they refer to the eleventh paragraph of this answer hereinafter. They admit that the insurance on the life of the said testator mentioned in his will amounted to \$5000 and that the said sum was collected and paid over to the certain Emma V. Montgomery in the said paragraph mentioned, but as to the use by the said Emma V. Montgomery of the said sum, or the income thereof, they refer to the statements of the thir-

21 teenth paragraph of this answer hereinafter. They admit that the real estate named in and devised by said will consisted chiefly of the house and lot occupied by the said testator as a residence.

6. They admit the allegations of the sixth paragraph of the said bill to be true, but for greater certainty they file herewith, marked Exhibits Nos. 2 and 3, true copies, respectively, of the certain statement or intervening petition of the complainant in the said paragraph mentioned and the answer thereto of the defendant Richard H. Brown, each and every statement contained in said answer to the said statement or intervening petition these defendants aver to be true, and they call for strict proof, if material to their interests, of each and every of the allegations in the said statement or intervening petition contained.

7. They admit the appointment of the defendant Brown as administrator of the estate of the said Emma V. Montgomery and the filing by him of the inventory and appraisal of her personal estate as in the seventh paragraph of the said bill alleged, but they deny that the said Emma V. Montgomery obtained the certain note for \$3500 and the certain two notes for \$500 each in the said inventory mentioned by investing therein \$4500, or any part, of the money received by her under the will of the said Henry P. Montgomery as the life insurance therein mentioned, and they deny that the sums represented by the said notes, or any one of them or any part of the said sums, or of any of them, or any part of the personal estate formerly of the said Henry P. Montgomery, should go to the complainant at the death of the said Emma V. Montgomery according to the terms and intention of the said will.

8. They admit the respective claims of the complainant and the defendants as in the eighth paragraph of the said bill set forth, but they deny that the defendant Brown will take, or has any intention of taking, beyond the jurisdiction of this court or disposing of any of the property in the said paragraph mentioned, except in accordance with the due order and authority of the said last will and codicil of this court in the premises.

9. They deny the allegations of the ninth paragraph of the said bill to be true and, on the contrary aver that as to the personal property formerly of the said Henry P. Montgomery, if there be any to which the complainant is entitled, he has a full, complete and adequate remedy at law against these defendants and each of them, and they pray the same benefit of this averment as an objection to the jurisdiction of this court in the premises as though on account thereof they had formally demurred to the said bill of complaint.

10. And further answering, these defendants state as follows:—

At the time of his death (as appears from the petition of the said Emma V. Montgomery and the complainant filed in the office of the register of wills for the District of Columbia, In the matter of the estate of the said Henry P. Montgomery, a copy of which petition, marked "Exhibit No. 4" is filed herewith and prayed to be taken as part hereof), the said Henry P. Montgomery left as his entire estate, real and personal, the following and no other, namely, real estate—sub-lot numbered forty-four (44) in square numbered three hundred and five (305) in the city of Washington, District of Columbia, and part of lot forty-seven (47) in Wright & Cox's subdivision of Mount Pleasant and Pleasant Plains in the District of Columbia; and personal estate—insurance upon his life, \$5000; one share of the Capital Savings Bank of the District of Columbia, of the assumed value of \$100; an interest in the Teachers' Investment Company, so-called, of the assumed value of \$400; professional library and other books, of the assumed value of \$300; gold watch and chain, of the assumed value of \$50; and a

horse, carriage, buggy and harness, of the assumed value of \$100; of which said personal property the said share in the Capital savings bank was at the time of the death of the said Henry P. Montgomery and now is worthless; the said interest in the said Teachers' Investment Company never came into the hands of the said Emma V. Montgomery, his executrix as aforesaid, and the whereabouts and value thereof are unknown to these defendants, or either of them; the said professional library was, according to the terms of the said will of the said Henry P. Montgomery, delivered to the certain Musette Brooks therein named; the said other books were delivered to the complainant; the said gold watch and chain were, according to the terms of the said codicil to the said will, delivered to the certain Wilder P. Montgomery therein named; and
 24 the certain horse, carriage, buggy and harness were sold by the said Emma V. Montgomery for a sum not to exceed \$100 as aforesaid, a part only of which, however was in fact paid; so that of all the personal estate, real or supposed, of the said Henry P. Montgomery there came to the possession and use of the said Emma V. Montgomery only the said life insurance aforesaid and a portion of the proceeds of sale of the said horse, carriage, buggy and harness aforesaid.

11. No account of the complainant, as executor, and the said Emma V. Montgomery, as executrix, of the said Henry P. Montgomery has ever been made or rendered to this court, or at all, and the estate of the said Henry P. Montgomery, so far as the same was administered at all, was administered by the said Emma V. Montgomery, who, on account of the said estate, paid debts of the said testator amounting to \$207.41; expenses for the funeral of the said testator and a monument to him amounting to \$465; the expenses of his last illness amounting to, to-wit, \$750.00; for professional legal services in connection with the administration of the estate of the said testator, \$20; cost of the register of wills for the District of Columbia, \$17.70; to the Law Reporter Company for notice to creditors, \$5.00; legacy to Wilder P. Montgomery, \$200; and legacy to Richard B. Peters, \$100, which said last mentioned legacy, although purported to have been revoked by the codicil aforesaid, the said
 25 Emma V. Montgomery felt in duty bound to pay, as she believed that the revocation of the same had been made by the said testator through mis-information and mis-apprehension.

12. The defendants are advised, and therefore aver, that according to the true intent and meaning of the said last will and codicil of the said Henry P. Montgomery the said Emma V. Montgomery took an absolute estate in all the personal property of the said Henry P. Montgomery in and by the same bequeathed to her, and accordingly, the defendants deny that the said complainant has, or at any time had, any estate or interest in the same; and the said defendants further aver that as to the insurance aforesaid upon the life of the said Henry P. Montgomery the complainant heretofore, to-wit, immediately upon the collection of the same acknowledged

the right of the said Emma V. Montgomery thereto, absolutely, and united as executor of the estate of the said Henry P. Montgomery with her in the unqualified and unconditional delivery of the same to her, and she received, accepted and treated the same accordingly; wherefore the complainant is now estopped to claim any interest in the amount received by the said Emma V. Montgomery on account of the said insurance or to demand any accounting of the defendants, or either of them, respecting the same.

13. And further answering, these defendants say, that the said Emma V. Montgomery at the time of her marriage, during the continuance of the same, and at the time of the death of the said Henry P. Montgomery, was possessed in her own right absolutely, of a considerable estate, real and personal, a large part of which she had accumulated prior to her marriage, another large part of which, to-wit, over \$8,000, she derived by inheritance from her mother,
26 and still other portions of which she had acquired through judicious use and investment of her means; and upon the receipt of the said sum on account of the insurance upon the life of the said Henry P. Montgomery she paid on account of his debts and in the administration of his estate, as hereinbefore set forth, sums aggregating not less than \$1765.11 by reason of which the amount of the said insurance, to-wit, \$5000, was greatly reduced below the said sum of \$4500 aforesaid; and, in addition, at the time of his death the said Henry P. Montgomery was largely indebted to the said Emma V. Montgomery for advances and payments made by her on his account, including repeated payments of the premiums to keep alive the policy of insurance on his life, large payments on account of his protracted illness with a specific disease and on other accounts, which said indebtedness aggregated not less than the said sum of \$5,000 aforesaid, and which upon any proper accounting of the complainant and the said Emma V. Montgomery as executor and executrix as aforesaid she would be entitled as a creditor to have and receive from the estate of the said Montgomery, and therefore to have the whole of the said sum of \$5000, if necessary, to pay the said indebtedness to her, provided that the said sum were, according to the terms and provisions of the said last will aforesaid, applicable to the payment of the debts of the said testator.

And now having fully answered, these defendants pray hence to be dismissed with their costs.

RICHARD H. BROWN.
CORA L. PETERS.

HENRY E. DAVIS,
Solicitors for the Defendants.

27 DISTRICT OF COLUMBIA, ss:

Before me a notary public in and for the District aforesaid personally appeared Richard H. Brown and Cora L. Peters, who, and each of whom, being by me first duly sworn, depose and say, that

they have heard read the foregoing answer by them subscribed and know the contents thereof; that the facts therein stated upon their personal knowledge are true and those stated upon information and belief they believe to be true.

RICHARD H. BROWN.
CORA L. PETERS.

Subscribed and sworn to before me this 22d day of July, A. D. 1903.

[SEAL.]

EDWARD B. KIMBALL,
Notary Public, D. C.

Replication.

Filed Oct. 5, 1903.

In the Supreme Court of the District of Columbia.

Title of Cause.

28 The complainant hereby joins issue with the defendants, but admits the exhibits filed with defendants' answer to be true copies of the original papers therein named.

S. R. BOND,
C. C. COLE,
R. GOLDEN DONALDSON,
Complainant's Solicitors.

29 *Depositions on Behalf of Complainant.*

Filed Dec. 9, 1903.

In the Supreme Court of the District of Columbia.

Title of Cause.

Be it remembered that at examinations of witnesses held and taken pursuant to notice on the seventh and thirteenth days of November, A. D. 1903, at which examinations were present the solicitors for the respective parties, as noted herein, personally appeared before me, John E. Laskey, an examiner in chancery of this court, the within named witnesses, who being called for and on behalf of the complainant, and being by me first duly sworn to testify to the truth, the whole truth and nothing but the truth, touching the matters at issue in this cause, did depose and say what is hereinafter set out as stated by them.

JOHN E. LASKEY, *Examiner.*

In the Supreme Court of the District of Columbia.

Title of Cause.

WASHINGTON, D. C., *Nov. 7, 1903,*
Saturday, at 10 o'clock a. m.

30 Met pursuant to notice at the office of S. R. Bond, Esq., 321 John Marshall place northwest, to take testimony on behalf of the complainant in this cause.

Present: S. R. Bond, Esq., R. Golden Donaldson, Esq., solicitors for the complainant, and Henry E. Davis, Esq., and Harry Smith, Esq., solicitors for the defendants.

And thereupon FANNIE S. BRUCE a witness of lawful age, being first duly sworn, testified on behalf of the complainants as follows:

That she resides at 1911 Eleventh street northwest and has lived there for the last five years. She is a public school teacher and has been such for twenty six years in this city. She was acquainted with the late Henry V. Montgomery and his wife. Have known Mrs. Montgomery all my life and Mr. Montgomery about 26 years. I was very friendly to both of them. Mr. Montgomery was supervisor of one of the school divisions, saw them very often, Mr. Montgomery more often than Mrs. Montgomery; she used to come to his school, and later I used to go to the house very often particularly during Mr. Montgomery's illness. I was at their house during Mr. Montgomery's last illness in the presence of both of them almost every day.

Q. State whether or not during his last illness Mrs. Emma V. Montgomery said anything to you in regard to any money saved from his salary and if so, what did she say in his presence?

Mr. DAVIS: That is objected to as incompetent, irrelevant and immaterial.

31 A. She stated that he need not worry about some expense; that she had over two months of his salary there.

Q. Did she specify where it was?

Mr. DAVIS: Same objection.

A. She said in the bottom of her trunk.

Mr. DAVIS: The last two questions and answers are further objected to as hearsay.

Q. State whether after his death she said anything to you on that subject, and if so what?

Mr. DAVIS: Same objections.

A. The week following his death when I was there she stated that she had two months of his salary in the bottom of her trunk and part of that of the preceding month.

Q. State whether or not she subsequently said anything to you about the insurance money on the life of Henry V. Montgomery and if so what she said and when?

Mr. DAVIS: Same objections.

A. I can't tell the date but it was the summer previous to her death when she was preparing to leave the city she said although Mr. Montgomery had left her the use or benefit of five thousand dollars during her life she had never used a penny of it.

Q. Did she say anything about what was to become of it at her death?

Mr. DAVIS: Same objections.

A. She said she intended that, as well as all of his property, to go to his brother "Prof." meaning his brother Dr. W. S. Montgomery.

32 Q. During his lifetime state whether you heard either or both of them state anything about what was to become of their property at their death.

Mr. DAVIS: Same objections.

A. Yes. I have heard them both speak of that; in the summer of 1892 shortly after the death of an aunt of Mrs. Montgomery when I was with them at Lynchburg and she stated that if she died first it was agreed between them that her property was to go to her family and that his, if he should die first would go to his brother.

Q. State whether or not she said anything in regard to the property and its use during the life of the survivor, and if so what?

Mr. DAVIS: Same objections and further because leading.

A. I heard both Mr. and Mrs. Montgomery state what should be done with his property should she survive him, but nothing about her property as to whether he should have the use of it or not. She said that she should have the benefit or use of his property during her lifetime, and after that it was to go to his brother and I have heard him state the same thing; this occurred at Lynchburg in 1892.

Mr. DAVIS: Answer objected to for the same reasons.

Q. State whether or not you heard her say anything on that subject at a later date than 1892, either before or after his death except what you above stated.

Mr. DAVIS: Same objection.

33 A. I heard her say substantially the same thing in 1901 that that was their agreement, and from the way she spoke I thought she had made a will to that effect. That was out at the cemetery, out at his grave.

Mr. DAVIS: So much of the answer as purports to state the understanding of the witness is further objected to for that reason.

Q. What was the character of the relations between Mr. H. P. Montgomery and his wife? A. As far as I could see very affectionate, confidential and intimate.

Q. State what, so far as you had opportunity to observe were the relations between Mrs. Montgomery and Winfield Scott Montgomery, the complainant here? A. Intimate and confidential.

Q. State what opportunities you had to observe their relations and whether she talked to you in regard to them?

Mr. DAVIS: Objected to as incompetent irrelevant and immaterial and as calling for hearsay.

A. I saw them almost daily during his illness, Mr. H. P. Montgomery's illness and frequently together after Mr. Montgomery's death, always at the home of Mrs. Montgomery. She frequently spoke of her high regard and great affection for Dr. Montgomery on account of his worth and also for the thoughtful care he had given both her and her husband during the latter's illness. She further added that he would find after her death that she had remembered it. This was after Mr. H. P. Montgomery's death.

Cross examination.

By Mr. DAVIS:

34 Q. What was the occasion of Mrs. Montgomery's stating, the first time, that she had part of her husband's salary in her trunk. A. He spoke of the expense attending his illness and said that he had settled with several of his physicians, the last mentioned being Dr. Maxcy.

Q. How did you happen to be present? A. I went to report to him about some school affairs and also to see how he was.

Q. Who else was present? A. No one.

Q. What was the occasion of her speaking of it the second time and where was it? A. In her house when I went to see her the week following his death.

Q. Who else was present? A. No one. I spent the evening with her.

Q. Who brought the subject up? A. She did—Mrs. Montgomery.

Q. In what connection? A. She spoke of how careful he was not to have any outstanding debts and said that even now I have his salary for the last two months in the bottom of my trunk, and part of that of the preceding month.

Q. Did she say upon what funds they had been living during that period? A. She did. She said that Mr. Montgomery never allowed her to spend a penny of her income for the support of him or his household. She had often made that same statement before his death that he always paid the expenses of the house.

35 Q. What was the occasion of the conversation at the cemetery which you have related? A. She spoke of how she was trying to carry out his wishes in everything.

Q. What brought the subject up? A. She was speaking of his thoughtfulness for her during his life, how she missed him after his death.

Q. On any of the occasions which you have mentioned on which Mr. Montgomery and his wife or either spoke of the disposition of their property was anybody present except them and you? A. No. I don't remember anyone being present.

Q. How well do you know W. S. Montgomery and how long have you known him? A. I have known him for over twenty years, but not so well or so intimately as I knew his brother.

Q. Your relations however are perfectly friendly and have always been? A. Yes.

Q. When did you first tell him of any of these conversations between you and his brother and his wife or either? A. It was about December 1902. I don't know the day.

Q. What was the occasion? A. I had called on his wife and they spoke of the estate not being settled, and I remarked that I did not think there would be any difficulty about that, as I had heard them say that all of Mrs. Montgomery's property would go to her people and Mr. Montgomery's would go to his brother.

36 Q. Did W. S. Montgomery, or his wife, speak of any difficulty existing or contemplated about the settlement of the estates or either of them? A. He said that he wanted to understand clearly what was his rightfully, and did not wish to have anything that did not rightfully belong to him.

Question repeated.

A. He stated that he and Mrs. Montgomery's relatives differed about what was H. P. Montgomery's property.

Q. Did she say which of Mrs. Emma Montgomery's relatives were involved in this difference? A. He said he had had a conversation with Mr. Richard Brown regarding the matter.

Q. Did he say what Brown said or claimed? A. No, sir; he didn't go into the particulars of the matter.

Q. What is your age? A. Forty two years.

Q. Are you a native of this city? A. I am.

Q. And have lived here all your life? A. I have.

Q. And attended the public schools? A. Yes.

Q. Can you name the schools you attended? A. Cook, Sumner, High and Normal.

37 Q. Did you have any trouble in any of these schools in any matters or matter arising between yourself and any of your fellow pupils?

Mr. BOND: Objected to as irrelevant and immaterial.

A. Never to my recollection.

FANNIE S. BRUCE.

Subscribed before me, this 7th day of November, A. D. 1903.

JOHN E. LASKEY, *Examiner*.

And thereupon Mr. SAMUEL R. BOND a witness of lawful age, produced on behalf of the complainant, being first duly sworn, testified as follows :

By Mr. R. GOLDEN DONALDSON :

Q. What is your profession ? A. I am a member of the bar and have been such for over 40 years.

Q. Were you acquainted with Mr. Henry P. Montgomery, and his wife Emma V. Montgomery ? A. I was.

Q. How long were you acquainted with them ? A. I was acquainted with both of them for at least a dozen years before the death of Mr. Montgomery in 1899.

Q. Did you have anything to do with the settlement of the estate of Henry P. Montgomery and if so what ? A. Very soon after the death of Henry P. Montgomery his brother Dr. Winfield S.
38 Montgomery and his widow Emma V. Montgomery called and requested me to attend to the probating of his will of which they were executors and the obtaining letters testamentary, which I did.

Q. Did she say anything to you about the insurance money she had drawn on the life of her husband and if so what ?

Mr. DAVIS : Objected to as incompetent irrelevant and immaterial and as calling for hearsay.

A. She did. Early in the fall of 1899 she called upon me at my office and asked me if I could find a good and safe investment for the money which had been drawn by the executors for the insurance on her husband's life. She said that she would like to invest forty-five hundred dollars of it, and if a good opportunity to invest just that amount should not be found, she could make it an even five thousand dollars. She said she wished to keep it invested together, if she could, and hoped she could get six per cent. interest. I told her I would look out for a good chance to invest it. Sometime after she called to see if I had found such a chance and I told her no, I was unable to find one. The following winter she called again and told me that she had invested thirty-five hundred dollars of it in a note for that amount secured by a deed of trust on real estate, and was expecting soon to invest a thousand dollars more in a similar manner. I was not acting in any way as her attorney at the time of these interviews, but simply as a friend.

Mr. DAVIS : Answer objected to for the same reasons as above stated and further as disclosing confidential communications between attorney and client.

39-41 Cross-examination.

By Mr. DAVIS :

Q. Mr. Bond you drew Henry P. Montgomery's will, did you not ?

A. I did not.

Q. Did you draw any will for him ? A. I have no recollection of having done so.

Q. You did however attend to the administration of his will for Mrs. Montgomery. Did you not ? A. I attended only to the probate of the will and obtaining letters testamentary.

Q. Did you write Mrs. Montgomery's will ? A. I did not.

Q. Did you write any will for her ? A. I did not, to the best of my recollection.

Q. You prepared the petition for the admission of Henry P. Montgomery's will to probate and the granting of letters testamentary thereon ? A. I did.

S. R. BOND.

Subscribed before me, this seventh day of November, A. D. 1903.

JOHN E. LASKEY, *Examiner*.

42 WASHINGTON, D. C., FRIDAY, Nov. 13th, 1903—

Two thirty o'clock p. m.

Met pursuant to adjournment, at the office of Samuel R. Bond, Esq., 321 John Marshall place, northwest, to resume the taking of testimony on behalf of the complainant.

Present: Samuel R. Bond, Esq., solicitor for the complainant, Henry E. Davis, Esq. and Harry Smith, Esq., solicitors for the defendants.

And thereupon WINFIELD SCOTT MONTGOMERY a witness of lawful age, introduced on behalf of the complainant, being first duly sworn, testified as follows :

(Direct examination by Mr. BOND :)

I am the complainant in this action, my age is fifty ; I reside in this city and have since 1882 and am a public school teacher
43 and am a brother of the late Henry P. Montgomery who was forty-nine years of age at the time of his death April 26, 1899. My brother resided in Washington continuously from 1876 until the time of his death and was by occupation a public school teacher.

Q. State, if you know, what his salary was as a public school teacher from 1876 until his death.

Mr. DAVIS : Objected to as irrelevant and immaterial and as calling for hearsay.

A. His salary from 1876 until the spring of 1879 was \$960 per year ; from 1879 until 1882 I don't know exactly, but I think it was

\$1200 per year; from 1882 until 1885 \$1500 per year; from 1885 until his death \$2000 per year.

Q. What were his habits as to frugality and providing for his household and of whom did that household consist during the later years of his life?

Mr. DAVIS: Objected to as incompetent, irrelevant and immaterial.

A. He was a man who lived well within his means; not an extravagant person; he provided well for his household, which consisted of himself and wife only.

Q. Do you know who drew his will? A. He himself drew it.

Q. You and his widow were the executors — his will, were you?
A. We were.

Q. State what was done by the executors in reference to your brother's life insurance. A. The policy of \$5000 was collected by Mrs. Montgomery and myself as executors, June 14, 1899. The money was paid to us by check. We went to the National
44 Safe Deposit Savings and Trust Company, of this city, where we had the check cashed and we deposited a portion of that money in that institution; we then went to the American Security and Trust Co. of this city, where we also deposited a portion of the money; we then went to the Washington Loan & Trust Company, of this city, and deposited, I think, not quite all of the remainder, within two hundred dollars of it, I think. These deposits were all in the name of Emma V. Montgomery.

Q. State why the deposits were made in her name.

Mr. DAVIS: Objected as irrelevant and immaterial.

A. I felt that she was to have the use of this money and thought it would be much easier for her to get at it by so having it deposited.

Mr. DAVIS: The foregoing two questions and answers are further objected to as calling for and reciting transactions with the deceased and notice is given that the court will be moved to strike out the same and all other testimony open to the same objection.

Q. State whether or not all the debts of your brother's estate and the legacies left by his will have been paid, as well as his funeral expenses. A. The legacies and the doctors' bills have been paid; the funeral expenses have been paid; a nurse employed during the last two weeks of his illness has also been paid. As far as I know all of his debts have been paid. He had very few debts.

Q. Did the executors, or have you, rendered any account
45 to the probate court? A. We have not as executors rendered any account.

Q. Why not?

Mr. DAVIS: Objected to as irrelevant and immaterial.

A. We did not render an account to the court because we gave a

special bond for the faithful discharge of the trust. We were advised that it was not necessary to render an account, because of this bond.

Q. Have you made a written statement of such account based upon your best knowledge, information and belief, and if so, please produce it.

Mr. DAVIS: Objected to as incompetent irrelevant and immaterial.

A. I have made such statement and here it is. (Handing Mr. Bond a paper.)

Mr. BOND: I propose to offer this statement in evidence.

Mr. DAVIS: Same objection.

The paper was then offered in evidence and is hereto attached, marked Exhibit W. S. M. No. 3.

Q. According to this statement what is the balance of his personal estate after the payment of his debts, legacies, funeral expenses, the \$100.00 paid Richard B. Peter and the amount paid for a monument erected to his memory.

Mr. DAVIS: Same objection and further because the paper speaks for itself.

A. \$5,150.00.

Q. Have you any personal knowledge as to the investment of that money or any part of it, except what you received through Emma V. Montgomery?

46 Mr. DAVIS: Objected to as calling for hearsay.

A. The knowledge I have is from her own lips.

Counsel for complainant states to the witness that he does not wish the witness to say what Mrs. Montgomery said as the same would be incompetent.

Q. What were your relations with your brother and the degree of your intimacy?

Mr. DAVIS: Objected to as irrelevant and immaterial.

A. The relations between us were most intimate and confidential and friendly.

Q. State whether or not you were with him frequently during his last illness and how long that illness lasted.

Mr. DAVIS: Same objections.

A. I saw him almost every day and every night during his illness which lasted from December 1898 until his death in April 1899; that is his confinement to the house.

Q. State up to what date his salary was paid.

Mr. DAVIS: Objected to as hearsay unless the witness shows personal knowledge.

A. His salary was paid up to the first of May 1899.

Q. His salary as a teacher was paid and the salaries of all teachers are paid in ten monthly installments are they not? A. Yes, sir, they are.

Q. What were your relations with Emma V. Montgomery, both before and after your brother's death and up to the time of hers?

47 Mr. DAVIS: Objected to as irrelevant and immaterial.

A. Our relations were very intimate confidential and friendly.

Cross-examination.

By Mr. DAVIS:

Q. How do you know what your brother's salary was? A. I occupied a similar position in the public schools and we drew the same salary.

Q. You say that your brother's habits were economical, didn't he have a fondness for horses, and didn't he keep two horses and a carriage and a trotting buggy? A. He was very fond of a horse. He kept for a while two horses for a short time only. He had a carriage for the family and a single buggy.

Q. He kept one horse all the time, didn't he? A. Nearly all the time.

Q. Where did he keep his horse or horses, in a private or public stable? A. He kept his horse in a private stable attached to his house.

Q. Did he have a man or men to attend to his horse or horses. A. He usually kept a man.

Q. You say that he lived well within his means, how do you know this? A. From my intimate relations with him.

Q. Do you mean to say that you know all of his expenditures? A. I do not.

48 Q. Did he contribute anything to the support of any member of his family except his wife? A. I am not aware of any such support.

Q. How many brothers and sisters had he? A. I don't know. He had none that I know of except myself.

Q. Do you know a woman named Anna Barnett. A. I do not.

Q. Did you ever have a sister or a deceased brother besides Henry P. Montgomery?

Mr. BOND: I object to that as irrelevant and immaterial and not proper cross-examination.

A. I had not.

Q. You say that your relations with your brother were intimate and confidential? Do you know that he corresponded with a woman named Anna Barnett and that they addressed each other as brother and sister?

Mr. BOND: Same objections.

A. I do not.

Q. You had no brother named Benjamin? A. I never saw any brother by that name.

Question repeated.

Mr. BOND: I note the same objections.

A. I never knew of such a brother and never saw him.

Q. Did you ever hear of him.

Mr. BOND: Same objections.

A. I say I never knew of such a brother. I mean I never saw him. I have heard that there was such a brother.

Q. Have you ever heard that you have any sisters? A. I heard that there was one.

49 Q. When and where were your parents married?

Mr. BOND: Same objections.

A. I don't know.

Q. Was either of your parents married oftener than once?

Mr. BOND: While I object to the question and to this examination on the ground stated above, I have no other objection to the inquiry or to the witness stating fully everything concerning the matter now being inquired into.

A. I do not know.

Q. Where were your parents living when you were born? A. In Mississippi.

Q. Were your parents slaves? A. I suppose so.

Q. How do you know who drew your brother's will? A. By ocular evidence.

Q. What do you mean by that? A. I have seen the will and I know his handwriting.

Q. Then what you wish to say is that the will which your brother executed is in his handwriting? A. The will is in his handwriting, but a part of the codicil is not.

Q. You do not know whether he composed so much of the will as is in his handwriting or whether somebody compared it for him and he copied it? A. I know the will is in his handwriting I am satisfied he wrote it.

Mr. DAVIS: The latter part of this answer is objected to as incompetent.

50 Q. Why did you make oath in your petition for letters on your brother's will that you were his only heir at law?

Mr. BOND: Objected to as irrelevant and immaterial and not proper cross-examination.

A. I considered myself the only heir at law.

Q. But you did not know that your parents were married and you had heard of at least one other brother and sister or persons reputed to be such, is not that so?

Mr. BOND: Same objection.

A. It is so.

Q. Did you ever have any correspondence with either the reputed brother or the reputed sister?

Mr. BOND: Same objection.

A. I recall none.

Q. Did you pay the debts legacies and funeral expenses of your brother? A. Through agreement with Mrs. Emma V. Montgomery she paid them.

Q. Did you ever handle a dollar of your brother's estate except to assist his widow in turning over to her the life insurance? A. I have.

Q. How much, and what did you do with it? A. Two hundred dollars which was expended in the education of my son Wilder P. Montgomery at Andover academy.

Q. From whom did you get that sum. A. Mrs. Emma V. Montgomery.

Q. In the statement which you have presented today, you
51 have mentioned \$500.00 as cash on hand of decedent at time of his decease. Where was that money at the time of his decease? A. In the possession of Mrs. Emma V. Montgomery, his wife.

Q. How do you know? A. I heard her so state a week or so before his death.

Mr. DAVIS: Objected to as stating a transaction or conversation with the deceased.

Q. Who got the seventy five dollars from sale of horses etc. set forth in your statement. A. I suppose Mrs. Emma V. Montgomery; she told me she sold the horse.

Mr. DAVIS: Same objections.

Q. Who got your brother's salary for April 1899? A. Mrs. Emma V. Montgomery.

Q. Why do you state it as \$200.00, if you can answer without giving any conversation with her? A. The salaries of public school teachers are paid in ten monthly installments.

Q. Do you know who owned the household effects mentioned in your statement? A. I think that the statement made there covers what properly belonged to my brother.

Q. Why did you not mention in your petition for letters, the two sums of five hundred dollars and two hundred dollars about which you have been testifying? A. I felt that that money would be

needed to settle any debts that might lie against the estate, and — Mrs. Emma Montgomery my co-executor did not bring it up I did not interpose any objection.

52 Q. Did you have an aunt by the name of Julia, living in Louisiana? A. I did.

Q. Do you know anything about your brother's sending her, through Colonel Lewis, collector at the port of New Orleans, any money? A. I do not.

Re-direct by Mr. BOND :

Q. Since Mr. Davis has seen fit to inquire into your early condition and relations, I will ask you to state, briefly, as to your and your brother's birth and subsequent lives and careers and whether or not you and he have always recognized each other and been recognized as brothers?

Mr. DAVIS: Objected to as immaterial and as to the latter part of the question as leading.

A. We were born in Mississippi as slaves; carried to New Orleans at the breaking out of the war of the rebellion; joined the 8th Vermont regiment as body servants to officers therein; at the close of the war carried to Vermont. He with Doctor Gillette, in Orange county, myself in Windom county. He was educated in the public schools and academy and normal school of Vermont. I also. I went to Dartmouth college, was graduated in 1878. He was graduated from the State normal school at Randolph Vermont in 1876. During our sojourn in Vermont we were recognized as brothers, visiting each other frequently. In 1876 he secured a position as a public school teacher in the District of Columbia, where he remained until his death. I, after graduation, came to the District of Columbia and was appointed to a school in the

53 county. In the fall of 1878 I got a call to Mississippi to teach, where I remained until the fall of 1882. At that time I was called to this city where I have remained up to the present. I am a graduate in medicine, holding a diploma of Howard university. At present I am assistant superintendent in charge of the public schools of the District of Columbia.

Mr. DAVIS :

Q. Have you a diploma in any other profession or have you ever studied any other than that of medicine. A. I have studied the profession of school teaching. I haven't any diploma as to that.

Q. That is all, is it? A. That is all.

WINFIELD SCOTT MONTGOMERY.

Subscribed before me this 16th day of November, A. D. 1903.

JOHN E. LASKEY, *Examiner.*

DECEMBER 8, 1903.

Counsel for the complainant advised the examiner that his case in chief was closed, and the examiner so advised Mr. Henry E. Davis, of counsel for the defendants.

JOHN E. LASKEY, *Examiner.*

54 In the Supreme Court of the District of Columbia.

Title of Cause.

It is hereby stipulated and agreed that Henry P. Montgomery and Emma V. Montgomery were married in March, 1879, and that Emeline Brown, mother of said Emma V. Montgomery, died in May, 1887; and that, to avoid recalling Winfield Scott Montgomery as a witness, this stipulation may be attached to his deposition with the same effect as if he had testified to the facts above stated.

HENRY E. DAVIS,
HARRY SMITH,
Att'ys for Def'd'ts.

S. R. BOND,
C. C. COLE,
R. GOLDEN DONALDSON,
Sol'rs for Complainant.

55

EXHIBIT W. S. M. No. 1.

Executors' Account.

Account of Emma V. Montgomery and Winfield S. Montgomery, Executors of the Last Will and Testament of Henry P. Montgomery, Late of the City of Washington, District of Columbia, Deceased.

DR.

The said accountants charge themselves as follows, viz: .

To life insurance money received.....	\$5,000.00
To cash on hand of decedent at the time of de- cease.....	500.00
To cash from sale of horse, carriage and har- ness.....	75.00
To cash salary of deceased for April, 1899.....	200.00
To household effects left in possession of Emma V. Montgomery to the estimated value of not less than.....	300.00

CR.

The said accountants claim credit and allowance for the following payments, etc., viz.:

By doctor's bills—\$100—nurse \$50.....	150.00
By legacy for Wilder P. Montgomery.....	200.00
By funeral expenses.....	175.00
By cash paid to Richard B. Peters, legacy revoked by codicil, but paid by consent and agreement of executors.....	100.00
By monument to the deceased, which W. S. Montgomery is willing to have charged to the estate, at cost of about.....	300.00
By balance delivered to Emma V. Montgomery as having an estate for life in the same.....	5,150.00
	<hr/>
	6,075.00 6,075.00

WINFIELD S. MONTGOMERY, [SEAL.]
Surviving Executor.

56 *Testimony on Behalf of Defendants.*

Filed Dec. 28, 1903.

In the Supreme Court of the District of Columbia.

Title of Cause.

Come now the defendants, by their solicitors, and move the court to direct a commission to issue to Louis B. Johnson, Boston building, Denver, Colorado, to take the deposition of Mrs. Isetta W. Brown, a witness in behalf of the said defendants, upon the interrogatories filed herewith and such cross-interrogatories as may hereafter be filed in accordance with the rules and practice of the court.

HENRY E. DAVIS,
HARRY SMITH,
Solicitors for the Defendants.

Samuel R. Bond, Esquire, solicitor for the complainant.

SIR: Please take notice that on —, the 8th day of January, A. D. 1904, at the opening of the court, or as soon thereafter as counsel can be heard, the foregoing motion will be presented to equity court No. 1.

HENRY E. DAVIS,
HARRY SMITH,
Solicitors for the Defendants.

57 Service acknowledged this 28th day of Dec., A. D. 1903.

S. R. BOND,
Solicitor for Complainant.

In the Supreme Court of the District of Columbia.

Title of Cause.

*Interrogatories to be Propounded to Isetta W. Brown as a Witness in
Behalf of the Defendants in the Above Entitled Cause.*

1. State your name, age and residence.
2. Are you acquainted with the defendants in this cause, namely, Richard H. Brown and Cora L. Peters? And are you related to either, and, if so, how?
3. Did you know the late Emma V. Montgomery, deceased, and what, if any, relation was she to the defendants?
4. If you knew the said Emma V. Montgomery, when and where did you first make her acquaintance?
5. Did you ever live in the city of Washington, D. C., and, if so, when did you first go there, how long did you remain and with whom did you live?
- 58 6. When and where did you last see the said Emma V. Montgomery?
7. If, in answer to the last interrogatory, you shall have stated that you last saw the said Emma V. Montgomery in the city of Denver, Colorado, state how long she was there, and whether while there you had any conversation or conversations with her about the insurance upon the life of her late husband, Henry P. Montgomery, and, if so, state how such conversation or conversations arose, and repeat the same as fully as possible.
8. If you had any conversation or conversations with the said Emma V. Montgomery as inquired of in the last interrogatory, state whether or not during such conversation or conversations she said anything about making any investment or buying any property in Colorado, and, if so, state fully what she said on that subject.
9. Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause. If yea, set forth the same fully and at large.

The said ISETTA W. BROWN being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified and deposed as follows:

Answer to interrogatory one. Isetta W. Brown, age 39 years, residence Denver, Colorado.

59 Ans. to Int. two. I am, Richard H. Brown is my husband and Cora L. Peters is my sister-in-law.

Ans. to Int. three. I did, she was a sister to my husband Richard H. Brown and sister to Cora L. Peters.

Ans. to Int. four. I first made her acquaintance in Lynchburg, Virginia, in the year 1880.

Ans. to Int. five. Yes sir, I came there the summer of 1880, living eight years with Emma V. Montgomery, and then I was married to her brother, remaining there until 1895.

Ans. to Int. six. In Denver, Colorado in the year 1900.

Ans. to Int. seven. She remained in this city for three months, residing in my house at the time. Yes, we discussed the life insurance of her husband quite extensively. The conversation arose by her telling me what disposition she had made of the life insurance; then having heard there was some trouble about the life insurance that had been left to her only conditionally, I said to her that I supposed she had not the right to use the life insurance. She said that I had been misinformed as to there being trouble about the life insurance, and she further stated that in a previous will her husband had left the life insurance to her conditionally only; but knowing that she kept up his life insurance by her own private means, he had come to see the injustice of leaving the insurance in that manner to her and had revoked that will and made another, leaving
60 her the life insurance absolutely; that she had after paying the expenses and a few debts remaining, also legacies which he had left to others, a monument, and picture of him which she had had made, she had appropriated the balance to her own use. She further stated that her expenses on account of his illness just previous to his death had been \$2,000. I think I mentioned in the first part of the answer, that she thought it would be great injustice for the insurance to go in the manner indicated in the first will of her husband.

Ans. to Int. eight. She spoke several times about buying a home in Colorado. She wanted to buy a house for myself and my husband, and made quite an effort to find a suitable piece of property, with that in view. My husband discouraged her in every way possible; he told her that it would be foolish for her to invest her money in that way; that she had better have the money, than have it in property. She did not, however, invest it in real estate in Colorado.

Ans. to Int. nine. I lived with Mrs. Montgomery in her home for eight years and our relations were as intimate as those of sisters, notwithstanding the fact that she was quite a little older than I, but our relations were very intimate, and we upon numerous occasions conversed with reference to the disposition of her property after her death. She stated frequently that it was her intention that her own relatives should benefit by her death, and that none of her property should go to any of his relatives; that she had considered her husband extremely extravagant in his notions

and tastes. When Mrs. Montgomery was here visiting
61 me in 1900, she said upon one or two occasions, that in case
anything should happen to me or my husband, that she would
feel it incumbent upon her to see that our children were properly
cared for and educated. I might further add that her husband had
no other income besides his salary, his tastes were expensive and he
kept a fine horse at considerable expense and with his other extravag-
agant habits, it nearly always resulted that when his premiums be-
came due for his insurance, he was unable to meet them, and it be-
came necessary for Mrs. Montgomery to advance the money from
her own funds for that purpose. This she did many times.

ISETTA W. BROWN.

Filed Feb. 17, 1904.

In the Supreme Court of the District of Columbia.

Title of Cause.

JANUARY 8TH, 1904—2 o'clock p. m.

Met, pursuant to agreement of counsel at the office of Mr. Henry E.
Davis in the Jenifer building, corner of 7th and D streets, north-
west, Washington, D. C., on Friday, January 8th, 1902 at 2
62 o'clock p. m. to take the depositions of witnesses on behalf of
defendant- in the above entitled cause.

Present: S. R. Bond, Esq., solicitor for complainant and Henry E.
Davis, Esq., and Harry Smith, Esq., solicitors for defendants.

Whereupon ALONZO TWEEDALE a witness produced on behalf of
defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. SMITH:

Q. Please state your full name. A. Alonzo Tweedale.

Q. What is your official position? A. Chief clerk of the auditor's
office, District of Columbia.

Q. Will you look at this paper and state what that paper is (hand-
ing paper to witness) A. This paper is a receipt from the assessor
of the collector's certificate that he had collected \$26.67 as a repay-
ment to the appropriation for public schools, 1899, salaries, on ac-
count of overpayment, to H. P. Montgomery.

Q. State if you know what was the actual amount of the salary
for April, 1899 paid to Mrs. Montgomery? A. The pay rolls shows
that there was \$200 paid. The receipt was taken for \$200 but the
pay roll itself shows the repayment just mentioned. \$26.67 has been
repaid on that account so that the difference is the actual amount of
payment for the salary for that month.

63-100 Q. This receipt shows that difference? A. I say the difference between that receipt and \$200 is the amount paid for the salary for that month.

Q. About \$173.33? A. Yes, I think that is it.

Mr. SMITH: I offer said receipt to be marked Exhibit Tweedale No. 1.

ALONZO TWEEDALE.

Subscribed and sworn to before me this 13 day of February A. D., 1903.

MARGARET M. MURRAY, *Examiner*.

101 At the same time and place also appeared RICHARD H. BROWN, a witness produced on behalf of defendants, being first duly sworn, testified as follows:

102 Direct examination.

By Mr. SMITH:

Q. Please state your full name, age, residence and occupation?
A. Richard H. Brown; age 61; residence 1916 11th street, northwest.

Q. State whether or not you are the administrator of the estate of your sister, the late Emma V. Montgomery? A. I am.

Q. Have you made a statement of her administration as co-executor of her husband's estate? A. I have.

Q. Look at that paper and say what it is. A. That is the statement.

Mr. SMITH: I offer that in evidence as Exhibit Brown, No. 1.

Mr. BOND: I object to that as incompetent, irrelevant and immaterial.

Mr. BROWN:

Q. How did you make that statement up? A. From vouchers that I found in Mrs. Montgomery's effects of things she had evidently paid.

Mr. BOND: I object to the answer as giving the opinion of the witness.

Q. Is that statement true? A. Yes.

Q. Will you state whether or not among the papers of the late Emma V. Montgomery you found any vouchers in relation to the estate of Henry P. Montgomery? A. I did.

103 Q. Look at this paper and state what it is. A. That is a receipt for \$122.41 on May 15th, paid to W. S. Montgomery.

Q. Paid by whom? A. Emma V. Montgomery.

Q. What is the date of that? A. May 15th, 1899.

Q. By whom is it signed? A. W. S. Montgomery, supervisor, 9th division, public schools.

Q. Will you look at this receipt and state what it is? A. That is the undertaker's bill for \$175, John W. Wright.

Q. To whom is that made? A. Mrs. Emma V. Montgomery for Henry P. Montgomery.

Q. Look at this and state what it is. A. A bill of P. H. Deis of \$290 for a monument over Mr. Montgomery's grave. That is dated June 30th, 1900.

Q. Look at that and state what it is. A. That is a bill to Mrs. Emma V. Montgomery of Louis J. Sanders, dated December 29th, 1903, for \$25. for massage treatment.

Q. When was the treatment rendered? A. It was from December 1898 to April 1899, received from Mrs. Emma V. Montgomery, &c.

Q. Look at that bill and state what it is. A. This is a bill to Mrs. Emma V. Montgomery, Dr. to William H. Davis & Brother, druggists, to amount of Prof. H. P. Montgomery's bill from January 23rd, 1899 to May 5th, 1899, \$33.92. This was paid May 5th, 1899.

104 Mr. BOND: I object to his stating that it was paid.

Q. Look at that and state what that is. A. That is administration fee in the estate of Henry P. Montgomery.

Q. Paid to the register of wills? A. For the register of wills, \$17.70.

Q. What is that you have in your hand? A. This is dated June 7th, 1899, received of W. S. and Mrs. F. V. Montgomery, executors, \$20 for professional services. It is to S. R. Bond, Dr.

Mr. SMITH: Now, we offer all these bills in evidence as Exhibits Brown Nos. 2 to 8, inclusive.

Mr. BOND: The first of those exhibits is objected to as not showing or indicating for what the money was paid or from what fund it was paid; and the bill of W. H. Davis is objected to as covering a period considerably after Mr. Montgomery's death.

Q. Will you look at that letter and state where and from whom and how you received it? A. I received this letter from Miss Emily Howland. She was a very intimate friend of my sister and had known her probably longer than anybody outside the family and knew her as a girl and she sent her to college, Oberlin college.

Q. How did she happen to send it to you? A. I wrote to Miss Howland and asked her.

Mr. BOND: Was this in its original envelope?

A. Yes. Here is the envelope.

Q. Now, will you look at that letter? A. This is a letter sent to me by Miss Howland.

Q. In whose handwriting are both of those letters? A.
105 In the handwriting of Mrs. Montgomery, my sister.

Mr. SMITH: We offer these letters in evidence with their envelopes, to be marked Exhibits Nos. 9, 10, 11 and 12, respectively.

Mr. BOND: The introduction of these letters in evidence is objected to on the ground that they are incompetent, irrelevant and immaterial.

Q. Mr. Brown, state whether or not you were acquainted with the furniture in the house in which the late Henry P. Montgomery died? A. I was pretty well acquainted with it.

Q. State, if you know, where the furniture came from? A. The furniture came out of my mother's estate and my mother's mother's estate. It was handed down for generations.

Q. Was some of it very old and antique? A. Very old. I know when they first went to housekeeping my mother furnished the house for them. Henry Montgomery had nothing. He was a man that I suppose was not worth \$100.

Mr. BOND: I object to the answer of the witness. It is not what he supposes.

A. (continued). I know my mother furnished the house, silver, bedding and practically everything that was in it.

Q. Was there anything modern in anything that came into your possession as the administrator of his estate? A. Yes, there was a folding bed that was modern.

Q. What else outside of that? A. I don't know. The
106 parlor set did not come from my mother. I don't know where that came from.

Q. State if you know whether or not the furniture that came into your possession as the administrator of that estate was furniture furnished by your mother or sister, or by Mr. Montgomery? A. Well, a great deal of it came out of the old family furniture, the feather beds and mattresses. Of course the sheets I suppose had worn out and they had them replenished, but I am speaking of when they went to housekeeping. My mother furnished the house then. It was all my mother's silver.

Q. What business did your sister follow, if any, after she married Montgomery? A. After she married she was practically keeping boarders all her life up to the time of his death.

Q. I want to know from your personal knowledge. A. From my personal knowledge. I can enumerate the people who boarded there, Mr. Scott Montgomery boarded and his wife boarded there among others, and John R. Lynch.

Q. That is after she married Mr. Montgomery? A. After she married Mr. Montgomery.

Q. Do you know what she did after you left her and went to Denver of your own knowledge? A. No, except what she stated in letters.

Q. You don't know personally? A. No, not after I went to

Denver. I can speak of it up to 1895 when I left here and from the time she married I boarded with her and my mother boarded with her a number of years.

Q. She kept boarders? A. She kept boarders right along.

107 Cross-examination.

By Mr. BOND:

Q. Mr. Brown, the carpets in the house at the time of Mr. Montgomery's death did not come from your mother's estate, did they?

A. No, not from my mother's estate.

Q. Nor from your mother? A. Yes, my mother bought them.

Q. Your mother bought them? A. She bought the carpets in the house.

Q. When? A. She bought them, I think, probably about 1881 or '2 or something like that—the parlor carpets I am talking about.

Q. She bought them when? A. I cannot say. Let me see——

Q. About 1893 you said?

Mr. DAVIS: He said 1891 or '2 or thereabouts.

A. I will say probably about 1899 or 1890—1889. I can tell the circumstances so well, but I have got it fixed in my mind because of a little incident that occurred when she bought them.

Q. How do you know she bought them? A. Well, Mrs. Simmons, my aunt, was here at that time and my mother gave my sister here, Mrs. Peters, \$100 as a present and told her not to mention the fact to Mrs. Montgomery. She wanted to give that to Mrs. Peters as she had a number of children and one thing or another. Mrs. Peters told the circumstances to Mrs. Montgomery, and after she told
108 her, why Mrs. Montgomery thought she ought to have \$100 too, and Mrs. Brown, my mother, bought these carpets to satisfy that little jealousy that one sister had towards the other in getting more than she got.

Q. Do you mean to say that all the carpets in the house had been there for about ten years? A. I don't say how long they had been there. I say the house was first furnished——

Q. First furnished? A. The house was furnished.

Q. You were not considering exactly these individual carpets left in the house at the time of Mr. Montgomery's death? A. Oh, well——

Q. You mean to say your mother at that time gave her some carpets? A. Yes, she furnished the carpets.

Q. That is what you mean? A. That is what I mean.

Q. You don't know that those were the same carpets that were in the house when he died? A. Yes, these carpets were in the house when he died, the carpets my mother bought.

Q. How do you know? A. From the fact that she bought these carpets to passify Mrs. Montgomery.

Q. Do you know whether Mr. or Mrs. Montgomery bought any carpets after that? A. Mr. Montgomery never bought any carpets.

Q. You mean to say those were the same carpets and no new carpets came in the house? A. Yes, there was one new rug
109 since that. That was in the basement.

Q. How about the crockery &c. in the house? A. Most of it came out of the family, my mother's crockery, and old Liverpool ware which I have sold off since the estate has been in my hands, which has been handed down from my grand-mother, a good deal of it. Of course a good deal of it was broken. Of course they bought some saucers and plates.

Q. Did that crockery left in the house consist principally of Liverpool ware? A. Not wholly.

Q. I said principally? A. Not principally either, but all that was any account was what had been handed down. The old cake baskets were very antique.

Q. In your statement here, Mr. Brown, I see you have put in first a receipt of W. S. Montgomery for \$142.41? A. Yes.

Q. Do you know what that was for? A. I think it is stated in the account.

Q. Something he held for the school division? A. It is stated in the account.

Q. Something he held for the school division? A. I cannot tell you anything more than is in the statement and voucher.

Q. You put it here as money belonging to the 9th school division? A. That is what the voucher states.

Q. You don't know what that fund was it was paid out of?
110 A. If you want me to draw my conclusions——

Q. You have no personal knowledge? A. Only that Mrs. Montgomery gave that to him.

Q. You have no personal knowledge further than that? A. Only she gave him that from the receipt.

Q. Here is Miss Lucas, nurse, \$54. When was that paid, do you know? A. It was paid by Mrs. Montgomery.

Q. When was it paid? A. It was paid after Mrs. Montgomery got the life insurance. So Miss Lucas told me that she——

Mr. BOND: I object to that.

Q. You put it in as the amount Miss Lucas told you that Mrs. Montgomery had paid her; is that it, Mr. Brown? A. Yes, just as Miss Lucas testified a little while ago.

Q. What she told you about it? A. Yes, and she corroborated it.

Mr. DAVIS: He wants to know whether that is the source of the information?

A. Yes. Miss Lucas testified to that.

Q. And all you know about this item of \$314 in favor of Cora L. Peters is what she told you? A. Her bill.

Q. During the time of Mr. Montgomery's last illness and some

years prior to that and up till after his death you were in Denver, Colorado, were you?

Re-direct examination.

By Mr. SMITH:

Q. In regard to these carpets, when did your mother die,
111 do you recollect? A. She died in 1887.

Q. Were those carpets bought prior to her death? A. Yes, prior to her death.

Q. You testified they were bought in 1888 or 1889 you thought?
A. Yes, then they were bought prior to her death.

By Mr. DAVIS:

Q. Prior to 1887? A. Prior to 1887. I was getting Mrs. Simmons' death mixed up with my mother.

RICHARD H. BROWN.

Subscribed and sworn to before me this 10 day of February,
A. D., 1904.

MARGARET M. MURRAY, *Examiner*.

WASHINGTON, D. C., *February 2d*, 1904—2 o'clock p. m.

Parties met pursuant to notice at the office of Henry E. Davis, Esquire, Jenifer building.

Present on behalf of the complainant: S. R. Bond, Esquire.

Present on behalf of the defendants: Messrs. Henry E. Davis and Harry Smith.

Whereupon WINFIELD SCOTT MONTGOMERY, a witness produced by and on behalf of the defendants, being first duly sworn was examined and testified as follows:

112 By Mr. DAVIS:

Q. You are the same Winfield S. Montgomery who was heretofore examined in this cause and are the complainant herein? A. I am.

Q. I show you a letter, addressed to Mr. B. W. Smith, dated March 29, 1900, and purporting to be signed with your name, and also the envelope accompanying the same. Are these in your handwriting, and were they sent by you?

Mr. BOND: I object to the letter and envelope, as irrelevant and immaterial.

A. This is my handwriting, and I probably sent the letter.

Q. The letter and envelope are offered in evidence and are marked "Exhibits Murray 1 and 2."

Mr. Bond objects to the introduction of these papers for the reason above stated by him.

Cross-examination.

By Mr. BOND:

Q. Did you ever see the person to whom this letter was written?
A. I have never seen him.

Q. How did you learn of his existence? A. Through my brother.

Q. What brother? A. Henry P. Montgomery.

WINFIELD SCOTT MONTGOMERY.

Subscribed and sworn to before me this second day of February, 1904.

MARGARET M. MURRAY,
Examiner in Chancery.

113 Thereupon the parties adjourned to meet subject to notice from counsel.

WASHINGTON, D. C., *February* 12, 1904—12 o'clock m.

Met pursuant to notice at the same place.

Present: Same counsel as before.

Whereupon ROBERT H. TERRELL, a witness procured on behalf of the defendants, being duly sworn according to law, was examined and testified as follows:

Direct-examination.

By Mr. DAVIS:

Q. Mr. Terrell, you are a member of the bar and justice-of-the-peace in this District? A. I am.

Q. Did you know Henry P. Montgomery, late of this District?
A. Yes.

Q. Did you ever witness a will for him? A. Yes.

Q. State the circumstances, please?

Mr. BOND: I object to the testimony as irrelevant and immaterial.

A. Some time ago I cannot exactly fix the time, but it was sometime between the years of 1886 or 1888, Henry P. Montgomery took me to the home of Mr. Bond at Iowa circle one evening about
114 eight o'clock, had me to witness a paper which he told me was his will.

Q. You mean Mr. S. R. Bond? A. Yes; S. R. Bond.

Q. Do you remember who were present besides Mr. Bond, Mr.

Montgomery and yourself? A. I do not; I don't think there was anyone else present; I want to say in explanation, I did not see the document, I simply witnessed it which he said was his will.

Q. Do you know whether this was before or after the death of Mrs. Brown, Mrs. Montgomery's mother? A. I do not recollect but as near as I can fix the time it was between the years 1886 and 1888. I do not remember when Mrs. Brown died.

Cross-examination.

By Mr. BOND:

Q. You do not know who drew the will? A. No, sir; I do not.

Mr. BOND: I here state, having been sworn in this case, that since I testified in behalf of complainant I have tried to refresh my memory by every means in my power, and while I do not consider this matter relevant or material to the issues in this case, after reflection and reference to my books and papers, I have no recollection whatever of having drawn a will for Henry P. Montgomery nor do I recollect or recall being present at the execution of one.

ROBERT H. TERRELL.

Subscribed and sworn to before me this 13, day of February, 1904.

MARGARET M. MURRAY,
Examiner-in-Chancery.

The counsel for defendants here announce their testimony closed on behalf of the defendants.

MARGARET M. MURRAY,
Examiner in Chancery.

115 & 116

EXHIBIT TWEEDALE No. 1.

Office of the Assessor, District of Columbia.

WASHINGTON, June 8, 1899.

Received of H. H. Darneille, disbursing officer, D. C. collector's certificate of deposit for the sum of twenty-six and 67 / dollars, the amount required, paid as repayment to app'n public schools D. C. 1899,

Salaries

(or in payment to H. P. Montgomery)

Amount paid :
\$26.67 / 100.

[SEAL.]

MATTHEW TRIMBLE,
Assessor, D. C.

. (MARGINAL NOTE).—Miscellaneous.

117

EXHIBIT BROWN No. 1.

Statement of Richard H. Brown, Administrator of the Estate of the Late Emma V. Montgomery, the said Emma V. Montgomery Being Co-executor of the Estate of the Late Henry P. Montgomery.

The late Emma V. Montgomery, as co-executor of the estate of Henry P. Montgomery, collected the following the only assets of the estate of the said—the late Henry P. Montgomery, viz.—

Proceeds of life insurance.....	5000.
One share of stock in Capital savings bank estimated value \$100.00—Actual value.....	.00
Interest in Teachers Investment Company estimated value \$400.00—Actual value.....	.00
Professional library books—estimated value \$300.00—Delivered to legatee.....	.00
Gold watch and chain—estimated value \$50.00—Delivered to legatee00
Horse and buggy and harness—estimated value \$100.00—Sold and collected.....	75.00
Household effects and furniture, estimated value \$300.00—There was no household furniture belonging to the estate.....	.00
Rec'd from District of Columbia salary for part of month of April 1899.....	173.33

Total collections..... 5,248.33

118 I claim the following disbursements made by my intestate as co-executor of the estate of the late Henry P. Montgomery, viz:

By paid register of wills.....	17.70
" " Washington Law Reporter (creditors' notice).....	5.00
" " S. R. Bond, att'y (professional service).....	20.00
" " John R. Wright (undertaker).....	175.00
" " P. H. Deis (monument over grave).....	290.00
" " Richard B. Peters (legacy).....	100.00
" " Wilder P. Montgomery "	200.00
" " Wm. B. Davis (druggist).....	33.92
" " W. S. Montgomery, the am't Henry P. Montgomery charged with as money belonging to 9th school division.....	122.41
" " Dr. Maxcy—medical attendance	25.00
" " Mrs. S. E. Lucas (nurse).....	54.00
" " Charles B. Washington (male nurse).....	15.00
" " Henry Johnson (male nurse).....	15.00
" " Cora L. Peters, for board of H. P. Montgomery wife and servant from Sept. 1st 1898 to April 30th 1899.....	314.00
" " John Sanders (massage).....	25.00

Total..... 1,412.03

This statement is not complete as to total expenditures made by intestate Emma V. Montgomery as co-executor of the estate of the late Henry P. Montgomery, as there were large expenditures made for medical attendance for which vouchers cannot be found, also a large number of other expenditures such as hire of servants, feed and care of horse and incidentals for which vouchers cannot be found.

The entire expenses were paid out of the proceeds of the life insurance, less the amount of \$173.33 collected from the District as salary for part of month of April 1899 and less \$75.00 collected by sale of horse wagon and harness.

RICHARD H. BROWN,
Administrator of the Estate Emma V. Montgomery.

124

EXHIBIT BROWN No. 9.

(On Envelope.)

Office of
Supervising Principal, Public Schools,
Ninth Division,
Sumner Building,
Cor. 17th and M Streets N. W.,
Washington, D. C.

(Cancellation stamp.)

MISS EMILY HOWLAND,
Sherwood,
Cayuga Co.,
N. Y.

(On back :) Two stamps.

125

EXHIBIT BROWN No. 10.

TUES. A. M.

MY DEAR FRIEND: Your kind letter reached me some time ago, but it found me battling for the life of my dear husband. You cannot know how much of my time it has taken to soothe this nervous invalid. He is now alarmingly ill—for some time I have employed a trained nurse (female) and have besides hired two men to care for him. He has been so restless that we have had to move him from cot to bed constantly. I have had for him massage treatment daily he has had electric treatment. I am employing the highest medical skill we have. I have had consultation after consultation. The best surgeons in our city have been called in only to tell me they cannot operate on him. At the earnest request of Mrs. Doolittle I have employed a man in Arkansas to heal him mentally. I recklessly spend every dollar I can lay my hands on to purchase for him freedom from pain. I shall of course become

involved. This I should not mind in the least if I could only bring back lost health, but to-day he is fading from my sight. I can only look at him and agonize. No tears come to my relief. For some days he was delirious, several times he raved until he was exhausted. All this I have witnessed and have wondered if mine is a heart of flesh to stand so much. I seem to be some other than myself. I have borne indeed a heavy burden. I stood the physical pain but the raving was more than I could bear and I have learned that there are things more terrible than death.

Yours always,

E. V. MONTGOMERY.

126

EXHIBIT BROWN No. 11.

(On Envelope.)

(Cancellation stamps.)

Office of
Supervising Principal, Public Schools,
Ninth Division,
Sumner Building,
Cor. 17th and M Streets N. W.,
Washington, D. C.

MISS EMILY HOWLAND,
Sherwood,
Cayuga Co.,
N. Y.

(On back :) Cancellation stamps.

EXHIBIT BROWN No. 12.

WASHINGTON, D. C., *Apr. 26, '98.*

MY DEAR FRIEND: My husband passed away at 8.30 this morning. I cannot tell you how I feel. My heart seems dead within me.

Yours

EMMA.

127

EXHIBIT MURRAY No. 1.

(On Envelope.)

W. S. M.
Sumner School,
Wash. D. C.

(Cancellation stamps.)

MR. B. W. SMITH,
Heads, Miss.

EXHIBIT MURRAY No. 2.

Office of Supervising Principal, Public Schools, Ninth Division,
Sumner School.

WASHINGTON, D. C., 3, 29, 1900.

Mr. B. W. Smith, Heads, Miss.

DEAR BROTHER: Your letter of March 26th, 1900, sent to my brother, H. P. was handed to me by my wife last night.

It opened a wound in our hearts for H. P. died the 26th of April, 1899, nearly one year ago. He had been unwell for more than two years, but did not give up work until December 1898. He then entered the house to leave it only as a corpse.

128 He suffered awful agony.

He had bladder trouble with a bony growth on the inside of his thigh.

During his life he occasionally mentioned you to me, but while he was suffering on the bed of death, he failed to speak of you.

To me you are more of a stranger than a kinsman, and so you can understand my seeming forgetfulness.

H. P. had seen you and remembered you from a boy, but I do not recollect anything about you or the others. I did see mother once, but could not go to call on you or the rest.

I also ran across Aunt Julia once in New Orleans.

I am in the same position held by H. P.

You speak of my family for which I thank you. I have five children, four girls and a boy, ages ranging from fifteen to two years.

H. P.'s widow is fairly well, and lives at the house where he died. I presume you have a family and I send love to you and the rest. Let me hear from you soon.

Yours,

W. S. MONTGOMERY.

Sumner school.

129

Decree Construing Terms of Will.

Filed Nov. 16, 1904.

In the Supreme Court of the District of Columbia.

Title of Cause.

This cause having come on for consideration by the court upon the pleadings and testimony and having been argued by counsel and considered by the court, it is, this 16th day of November, A. D. 1904, adjudged, ordered and decreed that by and under the last will

and codicil of Henry P. Montgomery, deceased, in the pleadings and proceedings mentioned, Emma V. Montgomery, wife of the said Henry P. Montgomery, took an absolute estate in the life insurance on the life of the said Henry P. Montgomery and all other personal property of him, the said Henry P. Montgomery, not in and by the said last will and testament mentioned or otherwise disposed of, and that the bill of complaint herein be, and the same hereby is, dismissed with costs. And from this decree the complainant in open court prays an appeal to the Court of Appeals of the District of Columbia, which is allowed, and the penalty of the bond on such appeal is fixed at the sum of two hundred and fifty (\$250) dollars, to operate as a supersedeas and for costs.

THOS. H. ANDERSON,
Associate Justice.

130

Memorandum.

December 5, 1904.—Appeal bond filed.

Order for Transcript on Appeal.

Filed Dec. 16, 1904.

In the Supreme Court of the District of Columbia.

Title of Cause.

To the clerk of said court :

Please prepare the record on the appeal in this case and include in the transcript the following, viz :

1. The bill of complaint and Exhibit A thereto (copy of will).
2. The answer of defendants, omitting the exhibits attached to the same.
3. Replication.
4. Depositions.
- 131 5. Opinion of Mr. Justice Anderson, if filed.
6. Decree.

Yours truly,

S. R. BOND,
C. C. COLE, AND
R. GOLDEN DONALDSON,
Solicitors for Complainants.

Service of a copy of the above is admitted this 16th day of December, 1904.

HARRY SMITH,
Of Counsel for Def'd'ts.

Filed Dec. 27, 1904.

In the Supreme Court of the District of Columbia, Holding an
Equity Court.

Title of Cause.

Opinion.

The bill of complaint in this cause is brought for the construction and interpretation of the will of one Henry P. Montgomery, deceased, who was a brother of the complainant, and also for specific relief in respect of certain specific property to which the complainant claims to be entitled under said will when properly construed.

The clauses of the will which are sought to be construed may be quoted :

"* * * after my debts and funeral charges are paid, I devise and bequeath as follows:

To my beloved and devoted wife, Emma V. Montgomery, all my real estate during her life with power to mortgage should her circumstances become such as to justify it.

I also bequeath to my wife, Emma V. Montgomery, my life insurance and all other property, not otherwise disposed of by this will.

To Richard B. Peters, in consideration of his great kindness to me, I bequeath the sum of one hundred dollars.

To my faithful friend and ever ready assistant, Musette Brooks, I bequeath my professional books.

At the death of my wife, Emma V. Montgomery, all of my property real, personal, and mixed, shall revert to my brother, Winfield Scott Montgomery and his heirs forever. * * *

The complainant, in and by his bill, sets up the death of the testator, Henry P. Montgomery, in the year 1899, that the life insurance mentioned in the will amounted to \$5,000, which sum was collected and paid over to the testator's wife, Emma V. Montgomery, that she used and enjoyed the income thereof up to the time of her
decease in the month of October 1902, that \$3500 of said in-

133 insurance money was and is invested in a certain note dated Feb. 27, 1900, drawn by John A. Schneider, payable five years after its date, and secured by deed of trust on lot 171 in square 156, Washington, D. C., that a further \$1000 of said insurance money was and is invested in two notes drawn by Annie L. Terrell, Hester V. Johnson, and William Terrell, for \$500 each, dated March 10, 1900, payable four years after date, and secured by deed of trust on lot 20 in square 110, Washington, D. C., and that, although complainant has notified the administrator as also the next of kin and heirs at law in the estate of Emma V. Montgomery

(which said administrator and next of kin and heirs at law are the defendants herein) that he is entitled, under the terms of the will of Henry P. Montgomery, to the aforementioned \$3500 note and also to the two aforementioned \$500 notes, together with securities accompanying the same, they refuse to recognize or protect the complainant's rights, or alleged rights.

The defendants, in and by their answers, deny—

I. That the money invested in the notes referred to was the insurance money in question; and

II. That the interest of Emma V. Montgomery in said insurance money was only for life,—on the contrary asserting that she took the same, under the will, absolutely and free from limitation.

I.

Concerning the first question, the complainant has taken the testimony of four witnesses, including himself. He testifies that the \$5000 insurance money was collected by himself and Emma V. Montgomery as executors of his brother's estate on June 14, 1899, and that they went together to the National Safe Deposit Savings and Trust Co. where they had the check cashed, depositing a portion of the money in that institution, another portion in the American Security and Trust Co., and a still further portion in the Washington Loan and Trust Co., this last-mentioned deposit consisting of all that was left of the fund (excepting about \$200). It is also proven by the

134 testimony of Samuel R. Bond that early in the fall of 1899 Emma V. Montgomery called upon him and asked him if he could find a good and safe investment for this money which had been drawn by the executors from the insurance on her husband's life, stating that she would like to invest \$4500 of it, and if a good opportunity to invest just that amount should not be found, she could make it an even \$5000, further saying that she wished to keep it invested together, if she could; that he was unable to find a good investment for the money, and the following winter she called again and told him that she had invested \$3500 of the money in a note for that amount secured by a deed of trust on real estate, and was expecting soon to invest a thousand dollars more in a similar manner; and further that he was not acting in anywise as her attorney at the time of these interviews, but simply as a friend. Testimony of Fannie S. Bruce and Joseph Hannoe was also taken on behalf of the complainant in reference to this insurance money, but it may be said to be devoted entirely to conversations alleged to have taken place with the two decedents relative to the disposition they are said to have desired made of the insurance money here involved. This last-named testimony does not seem to shed any particular light upon the identification of these promissory notes as representing the insurance money, but seems to have been adduced for the purpose of aiding in the construction of the terms of the will itself, and of course it is incompetent for this latter purpose.

The defendants have taken the testimony of a number of witnesses to prove the payment by decedent Emma V. Montgomery during her own and her husband's lifetime of certain premiums on the life insurance here in question and also the payment of various sums of money for the benefit of her husband and her husband's estate; but no testimony has been adduced by the defendants to rebut the *prima facie* evidence introduced by the complainant to prove that the one \$3500 and two \$500 notes left by decedent Emma
 135 V. Montgomery at the time of her decease were purchased out of this insurance money.

The testimony of the complainant has traced the fund in question as distinctly as can be reasonably required of him, and, if it were true that the moneys derived from this insurance and deposited on the dates mentioned in the three specific banks mentioned did not actually go into these notes, it was for the defendants to show it.

II.

The second question, however, is whether, even though this insurance money is traceable and actually traced, the complainant is entitled to it under a proper construction of his brother's will. In devising the *real estate* to his wife, the testator Henry P. Montgomery seems to have taken pains to add the express limitation "*during her life with power to mortgage should her circumstances become such as to justify it.*" And there is no denial by the defendants that the complainant became entitled to the testator's *real estate* after the death of the testator's wife. But, in bequeathing to his wife the "*life insurance and all other property, not otherwise disposed of by this will*" the testator makes use of no such qualifying language. He does, however, in the third paragraph occurring thereafter, make the following provision:

"At the death of my wife, Emma V. Montgomery, all of my property real, personal, and mixed, shall revert to my brother, Winfield Scott Montgomery, and his heirs forever."

In the construction of these clauses of the will, the defendants contend that the well-known rule that *a remainder over to a second person after an absolute bequest of personal estate to a first, is void for uncertainty*, should be applied, as also the equally well known rule that, *where there is a clear gift in a will, it cannot afterwards be cut down except by something which with reasonable certainty indicates the intention of the testator to cut it down.*

The complainant, on the other hand, contends that the will should not be so construed, unless it be indispensable, because such
 136 a construction would destroy a legacy obviously intended for the testator's brother; that no effort to explain the words in a different sense can do so much violence to the clause, as the total rejection of the whole bequest given in express terms to a brother.

The first and great rule in the exposition of wills, to which all other rules must bend, is, of course, that the intention of the testa-

tor expressed in his will shall prevail, provided it be consistent with the rules of law. *Smith v. Bell*, 6 Pet., 68. All parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but if it be found that several parts are absolutely irreconcilable, then the latter must prevail. *Jarman on Wills* (6th ed.) pp. 474, 705.

The rule that the posterior of two inconsistent clauses is to be preferred is, however, subject to one well recognized exception, which is not of less frequent application than the rule itself, namely—"That where there is a clear gift in a will, it cannot afterwards be cut down except by something which with reasonable certainty indicates the intention of the testator to cut it down." *Jarman on Wills* (6th ed.) p. 443.

The case at bar would seem to come within the doctrine of this exception to the general rule, and to be determinable by it.

The ultimate question here is, was the bequest by the testator to his wife of the \$5000 life insurance *absolute* or *limited*?

The first paragraph of the will, disposing of his real estate, gave his wife a *limited* estate only, viz. for life—

"To my beloved and devoted wife, Emma V. Montgomery, all my real estate during her life with power to mortgage should her circumstances become such as to justify it."

The language used by the testator indicates a clear purpose, in respect of this real estate, to provide for his wife during her life:

First. A home. *Second.* Maintenance, i. e. a source of maintenance in the event that all other available sources should fail.

137 In the next paragraph of his will, he makes further provision for his wife in the following language—"I also bequeath to my wife, Emma V. Montgomery, my life insurance and all other property, not otherwise disposed of by this will." This language standing alone unquestionably gives to the wife an absolute title to the life insurance and to "all other property, not otherwise disposed of by this will." It is a clear gift—not simply of the manual possession of the insurance policy—but of all that the policy represented, viz. its present value at his death. Applying then the reasonable and well settled rule (or, rather, exception to the rule) just referred to, and which was most carefully considered in the case of *Ranfield v. Ranfield*, 8 H. L. Cas. 224, cited in defendant's brief, that—*If there be a clear gift, it is not to be cut down by anything subsequent which does not with reasonable certainty indicate an intention to cut it down*, how does the case stand?

Is there any subsequent thing, word or phrase that indicates "with reasonable certainty" an intention to cut down this gift from an absolute to a limited estate? I think not. The language is, in itself, plain, concise, and without a shadow of ambiguity, and read as an independent clause or paragraph of his will leaves no possible doubt that he intended to bestow this insurance as a pure and perfect bounty upon his wife. He segregates this insurance policy from the balance of his estate and treats it as a matter wholly apart

from either his real or personal estate, and bestows it by its proper name and designation without limitation or qualification upon his wife; and, in disposing of his property, he manifests, as already suggested, a clear understanding of the distinction between a limited and an absolute gift. He gives to his wife a life estate in his real estate, and his life insurance outright.

In the two succeeding clauses, he makes bequests to his friends, Richard B. Peters and Musette Brooks, and then, in the following clause, he provides:

138 "At the death of my wife, Emma V. Montgomery, all of my property real, personal and mixed, shall revert to my brother, Winfield Scott Montgomery and his heirs forever."

There is nothing here showing with reasonable certainty any intention on the part of the testator to cut down his gift of the life insurance to his wife. While it may very well be that, by this form of expression, he wished to be understood as desiring his brother, upon the death of his wife, to have his estate rather than her next of kin, yet he in nowise attempts to cut down his gift to her or to in anywise interfere with her absolute disposition of it. Therefore, although had the testator's wife died before himself, the brother would, under the terms of the will, have taken all of the testator's property, and this for the reason that the clear gift to the wife would never have taken effect, yet, since the testator's wife did outlive the testator himself and the clear gift to her did take effect and was in nowise cut down by any provisions in the will, the testator's expressed desire that at his wife's death his brother should take in preference to his wife's next of kin is clearly void. A testator is not permitted by law to give an estate to one person outright, and yet at the same time, in a subsequent clause of his will, provide what shall happen to that estate upon the decease of the beneficiary.

In the case of *Howard v. Carusi*, 109 U. S. 725, involving a devise of real estate and bequest of personal property to the brother of the testator to be held, used, and enjoyed by him, his heirs, executors, administrators and assigns, forever, with the hope and trust, however, that he would not diminish the same to a greater extent than may be necessary for his comfortable support and maintenance, and that, at his death, the same, or so much thereof as he should not have disposed of by devise or sale, should descend to the testator's three nieces, it was held by the Supreme Court of the United States that, inasmuch as the absolute power of disposal was given in express and unequivocal terms, or clearly and unmistakably implied, to the first taker, the remainder over was void. See also the cases of *Holcomb v. Wright*, 5 App. Cas. (D. C.) 76; *Smith v. Bell*, 139 6 Pet. (U. S.) 68; *Brant v. Virginia Coal & Iron Co.* 93 U. S. 326; *Potter v. Couch*, 141 U. S. 316; and *Roberts v. Lewis*, 153 U. S. 367.

In the case at bar, the testator evidently intended that his widow should not be limited or embarrassed in any way in respect of this insurance money which he wished her to have. It would be most

unusual, indeed, for a testator in disposing of his life insurance policy, which he doubtless, and quite naturally, procured in order to ensure support for his wife in the event of his own prior death, to say to his wife that he did not mean that she should use the insurance money, but only that she should invest it and use the income; and, in the absence of an express declaration by the testator that he intended such an unusual disposition, the court would hardly be justified in holding such to have been his intention.

The clause of the will upon which the complainant relies, namely: "At the death of my wife, Emma V. Montgomery, all of my property real, personal, and mixed, shall revert to my brother, Winfield Scott Montgomery and his heirs forever." is in the nature, simply, of a residuary disposition. The clause was necessary in order to dispose of the fee to the real estate in which he had simply vested the widow with a life estate, but beyond this it is only to be treated as a general clause. The testator's first wish was to see to it that his wife should be properly cared for—and after that he looked directly to his brother. After his wife, whatever was to be disposed of he wanted to go to his brother; and, in order to ensure this, he made use of the broad, generic and comprehensive expression "all of my property real, personal, and mixed" as best adapted to provide for all possible contingencies—and it is not improbable that he found this stereotyped expression in some printed form or draft of will, and regarded it as an approved residuary one with no special meaning to him, but simply adapted to carry out his general idea that, after his

140 wife had thus been provided for, whatever of his estate remained undisposed of he wanted to go to his brother.

And, under this clause, it would seem quite clear that not only would his brother take the fee to the real estate, but also that, had the testator's wife not survived the testator, all of the property, real, personal, and mixed, would have gone to the brother. Yet the residuary clause, even in such event, would not, of course, include the professional books or the \$100 which he had *by clear gift* provided should go to his two friends specifically mentioned. It certainly cannot be maintained that by using the words "all of my property &c." "shall revert," the testator intended that the \$100 and his professional books should, in the event of the death of his wife, go to his brother. The very nature of this property would preclude any such construction; and, if the \$100 and the books are not included, it would seem that (except in the event of the wife dying before the testator, so that the gift to her would never take effect at all) *for the same reason* the insurance should not be.

The conclusion would seem to follow that, upon the death of the testator, his wife took absolutely the life insurance and also all other property of the estate, except the \$100, the professional books, and the fee to the land; the legatees mentioned took the \$100 and the professional books; and the testator's brother took the fee to the land after the preceding life estate of the wife. Therefore, it would also

follow that upon the death of the testator's wife (after first, however, surviving him) the life insurance money, being absolutely hers, would be administered as part of her estate rather than as part of the estate of her husband. *Percy v. Percy*, 24 Ch. D. 616. *McKim v. Harwood*, 129 Mass. 76.

It is believed that the construction indicated is the proper one, and a decree will be entered accordingly.

THOS. H. ANDERSON, *Justice*.

141 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, }
District of Columbia, } ss :

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 140, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 24,060, in equity, wherein Winfield Scott Montgomery is complainant, and Richard H. Brown *et al.* are defendants, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 19th day of January, A. D. 1905.

JOHN R. YOUNG, *Clerk*.

142 In the Court of Appeals of the District of Columbia, January Term, 1905.

WINFIELD SCOTT MONTGOMERY, Appellant, }
vs. } No. 1509.
RICHARD H. BROWN and CORA L. PETERS, Appellees. }

To the clerk of said court :

'The supposed errors for which this appeal is prosecuted are that the court below held and decreed that under the will and codicil of Henry P. Montgomery, his wife, Emma V. Montgomery, took and absolute estate in the life insurance and other personal property mentioned in the bequest to her, denied the relief sought by complainant's bill and dismissed the same.

You will please omit, in printing, the following parts of the record, viz :

The probate of the will comprising pages 14, 15, 16, 17 & 18, inclusive.

The title of the cause where it occurs after page 1 and insert in lieu thereof "(Title of Cause)."

The deposition of Joseph Hanno on pages 39 to 42 inclusive.

Notice for commission and interrogatories and depositions of Isetta W. Brown on pages 56 to 61, inclusive.

Depositions of Alonzo Tweedale, Frederick W. Maxey, Sarah Ella Lucas, Charles Washington, Cora L. Peters and Alfred M. Peters on pages 56 to 101, inclusive, and the depositions of Winfield Scott Montgomery and Robert H. Terrell on pages 11- to 114, inclusive.

Omit exhibits of Tweedale No. 1 page 115; of Peters No. 1, page 116, Brown Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 on pages 119 to 126, inclusive, and those of Murray on pages 127 and 128, as we

143 think the remainder of the record contains all that is necessary for the consideration of the questions involved.

S. R. BOND,
COLE & DONALDSON,
Sol'rs for Appellant.

Received a copy of the above this 24th day of Jan. 1905.

J. HARRY SMITH,
Of Counsel for Def'd'ts.

(Endorsed :) No. 1509. Court of Appeals. Montgomery v. Brown *et al.* No. 1509. January term, 1905. Designation of parts of record to print. Court of Appeals, District of Columbia. Filed Jan. 24, 1905. Henry W. Hodges, clerk.

144 Court of Appeals, District of Columbia.

WINFIELD SCOTT MONTGOMERY, Appellant,	} No. 1509.
vs.	
RICHARD H. BROWN and CORA L. PETERS, Appellees.	

To the clerk of the Court of Appeals:

You will please print the entire record of this cause excepting only, namely,

The probate of the will, comprising pages 14-15-16-17 and 18, inclusive.

The title of the cause where it occurs after page 1, and insert in lieu thereof (Title of Cause).

Deposition of Joseph Hannoe on pages 39 to 42, inclusive.

Depositions of Frederick W. Maxey, Sarah Ellis Lucas, Charles Washington, Cora L. Peters and Alfred M. Peters, from page 63 to page 101, inclusive.

Omit all of page 118.

Omit last 11 lines on page 119.

Omit all of pages 120 to 123, inclusive.

Omit first eight lines of page 124.

HENRY E. DAVIS,
J. HARRY SMITH,
Solicitors for Appellees.

(Endorsed :) Court of Appeals. No. 1509. Winfield Scott Montgomery vs. Richard H. Brown *et al.* Appellees' designation of parts of record to be printed. Court of Appeals, District of Columbia. Filed Jan. 28, 1905. Henry W. Hodges, clerk.

Endorsed on cover: District of Columbia supreme court. No. 1509. Winfield Scott Montgomery, appellant, vs. Richard H. Brown *et al.* Court of Appeals, District of Columbia. Filed Jan. 20, 1905. Henry W. Hodges, clerk.

v.

RICHARD H. BROWN,

BRIEF FOR AP

S. R.
COLE

IN THE
Court of Appeals of the District of Columbia.

JANUARY TERM, 1905.

WINFIELD SCOTT MONTGOMERY,
APPELLANT,

v.

RICHARD H. BROWN, AND CORA L.
PETERS, APPELLEES.

No. 1509.

BRIEF ON BEHALF OF APPELLANT.

STATEMENT OF THE CASE.

On April 26, 1899, Henry P. Montgomery, a Supervising Principal of the colored public schools of this city, died, without issue, leaving Emma V. Montgomery his widow, and this appellant his brother and heir-at-law.

He left a will dated December 1, 1898, written by himself, of which the only clauses pertinent to the issues in this case are:

“After my debts and funeral charges are paid I devise and bequeath as follows: To my beloved and devoted wife Emma V. Montgomery, all of my real estate during her life, with power to mortgage should her circumstances become

such as to justify it. I also bequeath to my wife, Emma V. Montgomery, my life insurance, and all other property not otherwise disposed of by this will.

"To Richard Peters, in consideration of his kindness to me, I bequeath the sum of one hundred dollars.

"To my faithful friend and ever ready assistant, Musette Brooks, I bequeath my professional books.

"At the death of my wife, Emma V. Montgomery, all of my property, real, personal and mixed, shall revert to my brother, Winfield Scott Montgomery, and his heirs forever."

Said Emma V. and Winfield Scott Montgomery were appointed executors.

The will was probated in June, 1899; the executors qualified by giving a special bond and paid the debts and funeral expenses. As part of the assets of the estate they collected the life insurance money, amounting to \$5,000, which was turned over to Emma V. Montgomery, who deposited all of it but about \$200 with certain trust companies in this city. (Record, p. 20.) She died October 26, 1902, intestate, leaving as her heirs-at-law and next of kin the defendants, her brother and sister. The real estate devised included the premises in which the testator resided, and in which his widow continued to reside till her death.

The appellee, Richard H. Brown, applied for letters of administration on her estate, the personalty of which was alleged in his application to amount to about \$6,000, and to consist of money in bank, secured notes, stocks, and household effects.

This appellant filed an intervening petition in the Probate Court advising it of his claim and contention that said Emma V. Montgomery took only a life estate in the personal property under her husband's will, and that at her death the same passed to and became the property of this

appellant; that among such property was the note of one Schneider, for \$3,500, secured by deed of trust, and another like note or notes amounting to \$1,000, similarly secured, in which notes she had invested \$4,500 of the life insurance money, and representing that there should be a discovery as to what personal property possessed by her at the time of her decease belonged to this appellant.

The appellee, Richard H. Brown, as administrator, replied to said petition, denying that he held the notes above mentioned, claiming that said Emma V. Montgomery took an absolute estate in the personalty left by her husband, free from limitation, and refusing to recognize or protect any right or interest of this appellant therein.

After letters of administration were issued to him he filed an inventory and appraisal of her personalty, containing, among other items, a note of John A. Schneider, dated February 27, 1900, secured by deed of trust on real estate in this city, for \$3,500, and two notes of Annie L. Terrell *et al.*, dated March 10, 1900, so secured, for \$500 each, and other secured note for \$1,000, and money in bank and on decedent's person to the amount of \$1,244.02, and giving the whole value of the personalty as \$7,424.57, and the debts and funeral expenses as \$250.00.

THE PLEADINGS.

For the purpose of settling these contentions, and of enforcing his rights, this appellant filed his bill in this case, setting forth the foregoing facts, and, among other things, praying the court to construe and interpret said will and to decree and direct said Richard H. Brown, as administrator, to transfer and deliver to complainant said note for \$3,500, and said two notes for \$500 each, with the securities therefor, and whatever further money or effects should be found by the court to have been received by him

belonging to the complainant; that he be enjoined from distributing or disposing of the same until the determination of the cause, and for general relief.

The defendant's answer takes issue upon the construction of the will contended for by complainant, contends that Emma V. Montgomery took an absolute estate in the personalty, denies that the said note for \$3,500 and two notes for \$500 each were obtained by Emma V. Montgomery by the investment of money received by her under said will, and alleges that she paid debts of said testator to the amount of \$1,766.11, and that he was also largely indebted to her for advances and payments made by her on his account aggregating not less than \$5,000, but admitted the other material allegations of the bill. A general replication was filed.

Were it not for the above-named denial and allegation in the answer the cause would have been set for hearing upon bill and answer, as involving only a question of law, but, by reason of them, it was deemed necessary to take testimony, and on the final hearing the decree was passed dismissing the bill, etc.

ASSIGNMENT OF ERRORS.

1. That the court erred in holding that, under the will in question, Emma V. Montgomery took an absolute estate in the life insurance and other personal property under the bequest to her, and that the limitation over to Winfield Scott Montgomery was void.

2. In dismissing the bill and not granting the relief prayed.

ARGUMENT.

1. *As to the construction of the will:*

Smith *v.* Bell, 6 Pet. 68, is so closely analogous to the case at bar, and has been so consistently followed by the U. S. Supreme Court and the courts of this jurisdiction, that we confidently present it at the outset as conclusive of the questions here in issue. Chief Justice Marshall there declared:

“The first and great rule in the exposition of wills, to which all others must bend, is that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law; and the whole will is to be taken together, and is to be construed so as to give effect, if it be possible, to the whole.”

This language has often been quoted, both for its weight as an authority and its aptness of expression, as in *Holcomb v. Wright*, 5 Appeals, 76; *Colton v. Colton*, 127 U. S. 300; *Potter v. Couch*, 141 *Id.* 296.

In Smith *v.* Bell the will provided:

“I give to my wife, Elizabeth Goodwin, all my personal estate, whatsoever and wheresoever, and of what nature, kind and quality soever, after payment of my debts, legacies and funeral expenses; which personal estate I give and bequeath unto my said wife, Elizabeth Goodwin, to and for her own use and benefit and disposal absolutely; the remainder of said estate, after her decease, to be for the use of the said Jesse Goodwin, her son.”

These expressions in favor of the first taker are stronger than those in the case at bar, yet the court held the limitation over to be valid, and declared (p. 76) that while no

words could more clearly give the whole estate absolutely to the wife the subsequent ones "the remainder of said estate, after her decease, to be for the use of the said Jesse Goodwin," just as clearly create a remainder in favor of the son, "as the whole will must be taken together, and so construed so as to give effect, if possible, to the whole," and adds, "either the bequest to the son must be stricken out, or it must limit the bequest to the wife, and confine it to her life."

If the court had been deciding the case at bar every word of its reasoning would apply to the construction of the will now in question.

Holcomb v. Wright, 5 Appeals, 76, is also closely analogous to the present case, and in which this court followed and applied the rules of construction laid down in *Smith v. Bell*.

The will of Mrs. Wright first bequeathed the sum of \$5,000 to Holcomb in trust to pay the income to her mother, Mrs. Post, during her life, and, at her death, to deliver the principal sum to her son, Harry Post Wright, his executors, &c. It then devised and bequeathed the residue of her property, real, personal and mixed, to her said son. If he should die before attaining the age of twenty-one, without lawful issue, then it devised and bequeathed all of said property, of which said son might die seized and possessed, together with said sum of \$5,000, to her said mother.

The learned counsel for the son in that case, and who now represents the appellees in this, contended that the will, especially by the use of the words "of which my son may die seized and possessed," vested the estate absolutely in the son, and that the limitation over was void.

The court, however, after commenting on *Howard v. Carusi*, 109 U. S. 725, cited against the validity of the limi-

tation over, held the limitation to be valid as to the \$5,000 and all other property, both personal and real.

In the present case the appellant is the next of kin and heir-at-law of the testator.

This court, in *Bradford v. Matthews*, 9 Appeals (p. 443), citing the Supreme Court, says, "the heir is not to be cut off or disinherited upon any doubtful construction," and the same reasoning applies, by analogy, as is said in 4 Mackey, 414, to the next of kin, as both are equally the natural objects of the testator's bounty.

We confidently rely on *Smith v. Bell* and *Wright v. Holcomb*, without discussing the abstract doctrine of remainders and executory devises, and further citations, of which we will make but few from a large number, are only given as illustrations of the applicatoin of the principle there established.

The Maryland cases are all in accord with our contention, among them being *Dallam v. Dallam*, 7 H. and J. 220; *Fenby v. Johnson*, 21 Md. 106, as to personalty; *Hilleary v. Hilleary*, 26 Md. 274; *Devecmon v. Shaw*, 70 Md. 219, relating to realty and personalty, in which the opinion of Chief Justice Alvey, who decided the case below, was adopted by the Court of Appeals.

Glover v. Condell, 163 Ill. 566; *Edwards v. Gibbs*, 39 Miss. 166; *Bullard v. Chandler*, 149 Mass. 532, a bequest of \$5,000 to S. C., after his death to "revert" to S., the same term of limitation as in the present will, and it was held good in favor of S. The court says, "The word revert is obviously used in the sense of 'go' or 'pass.'"

McMurry v. Stanley, 69 Tex. 227; *John v. Bradbury*, 97 Ind. 263.

We claim that all the cases in the U. S. Supreme Court bearing upon this question, including those cited in the opinion of the Justice from whose decision this appeal is

taken (p. 48), support our contention, and firmly adhere to *Smith v. Bell*.

It is argued in that opinion, and we assume the counsel for the appellees will so argue, that the testator did not "with reasonable certainty" manifest his intention to cut down the bequest to his wife, yet it is immediately admitted in the opinion, "It may well be that, by this form of expression, he wished to be understood as desiring his brother, upon the death of his wife, to have his estate rather than her next of kin." This is precisely what we are contending for. What he wished to be understood is his intention, and we claim that it is more clearly and distinctly expressed than it was in the case of *Smith v. Bell*, and several of the other cases cited.

But it is argued that the limitation "during her life" applied to the real estate shows an intention to give the personalty absolutely. In reply we say these words are those generally used to limit a devise of realty, and, although in the present instance the subsequent devise over to the appellant would have affected such limitation, they are used in connection with the words following to show the intention that, although it was only a life estate, the power to mortgage was coupled with it. There was no such occasion to use them with reference to the personalty, and the limitation was fully effected by the subsequent clause. It appears by the answer (p. 12) that the wife had a considerable separate estate, and, from the circumstances and relations of the parties as shown by the testimony (pp. 21, 25), the natural and evident intention of the testator was to share his property between his wife and his brother; but, by the contention of the appellees, she might have exhausted the realty by mortgage so that the brother would take nothing; and, as the matter now stands, if the decision below be sustained, all the testator's

personalty, as well as his wife's separate estate, will go to the appellees in absolute contravention of the expressed intention of the testator, and of the decision in *Smith v. Bell*.

Stronger and more comprehensive words could hardly have been used to carry the personalty, with the realty, to his brother at the death of his wife, than those used in this will.

Were the two clauses irreconcilable the latter must prevail.

3 Jar. Wills, p. 705; 6 Pet. 84; *Colton v. Colton*, 127 U. S. 311.

The widow's understanding of the testator's intention and of her interest in the personalty is shown by the testimony (pp. 15, 18).

There is no distinction between realty and personalty, including money, as subjects of an executory devise or bequest.

4 Kent's Com., marginal, p. 269; *Scott v. Price*, 2 S. and R. 629; 2 Redfield on the Law of Wills, p. 271, Sec. 24, and p. 275, Sec. 28.

This is recognized and embodied in our Code, Secs. 1025, 1029, last clause of 1036.

2. *As to the relief to which appellant is entitled:*

As the case now stands our contest relates to the three notes amounting to \$4,500, in which that amount of life insurance money is clearly shown to have been invested (pp. 18, 20), and it is so found by Mr. Justice Anderson (pp. 45, 46). These were held by the widow in trust for

this appellant, and are now so held by the appellee Brown as her administrator.

Colton *v.* Colton, 127 U. S. 310; Harbison *v.* James, 90 Mo. 411; Hooper *v.* Bradbury, 133 Mass. 303.

An executory devise cannot be barred by alteration or sale of the estate out of which it is created. The first taker would be liable for it in its changed form or for its value.

Holmes *v.* Williams, 1 Root, 340; Fearne on Remainders, 306.

It is clearly within the jurisdiction, and the duty, of a court of equity, upon the construction of the will for which we contend, to decree that the appellee, administrator, transfer and deliver the notes, with the securities therefor, and interest accrued since the decease of the testator's widow to the appellant, or that he make good their amount out of the estate of his intestate.

1 Story's Eq. Juris., Secs. 590-96; Beach's Mod. Eq., Secs. 210, 1033; Pomeroy's Eq., Secs. 156, 180, 181, 1153; Bowers *v.* Smith, 10 Paige, 200; Fenby *v.* Johnson, 21 Md. 105; Chase *v.* Ladd, 153 Mass. 126.

S. R. BOND,
COLE & DONALDSON,
Solicitors for Appellant.

APR 12 1905

*Henry W. Rodgers,
Clerk*

COURT OF APPEALS

OF THE DISTRICT OF COLUMBIA.

WINFIELD SCOTT MONTGOMERY, APPELLANT,

VS.

RICHARD H. BROWN, ET AL.

No. 1509:

Brief in Behalf of the Appellees.

HENRY E. DAVIS,

HARRY SMITH,

For the Appellees.

COURT OF APPEALS

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Brief in Behalf of the Appellees.

I.

This is an appeal from the Supreme Court of the District of Columbia construing the will of one Henry P. Montgomery, late of the District of Columbia, deceased. The will and a codicil purport to be set forth on pages 6 to 8 of the Record, but, as inspection of the original will show, the paper is not printed as written, in this, that the devise to the testator's wife of his real estate for life and the bequest to her of his life insurance and other property are printed as though they appeared in the will in one paragraph, whereas in fact, in the original, the two are separate, and appear as follows:

"To my beloved and devoted wife, Emma V. Montgomery, all my real estate during her life with power to mortgage, should her circumstances become such as to justify it."

"I also bequeath to my wife, Emma V. Montgomery, my life insurance and all other property not otherwise disposed of by this my will."

The same error is repeated in the brief of the appellant (pp. 1-2.)

Also, it is erroneously stated in the bill (Rec. 2), and in the brief (p. 1), that the appellant is the only heir at law of the testator. Although in the bill the appellant states under oath that he is the only heir at law and next of kin of the testator, it appears from his cross-examination (Rec. p. 23, 4), that he has at least one brother and one sister, and he identified a letter written and signed by him to his brother. (Rec. 42). Again, it is said in the brief (p. 9), that "The widow's understanding of the testator's intention and of her interest in the personality is shown by the testimony," reference being made to pages 15 and 18 of the Record. The widow's understanding in the premises is very plainly set forth in the deposition of her sister-in-law (Rec. 29), and very clearly she thought that she was to receive the life insurance absolutely.

It is also said in the statement of the case in the appellant's brief (p. 2), that "The real estate devised included the premises in which the testator resided and in which his widow continued to reside until her death." It is not assumed that the intention of this statement is to indicate that the testator's residence was the only real estate devised, the fact being that, in addition to his residence, he devised an unimproved lot in Mount Pleasant which yielded no income, and upon which his widow was obliged to pay taxes until her death. (Ans. par. 10, Rec. 10, Ex. 4).

II.

The learned Justice who rendered the decree below filed a written opinion (Rec. 44-50), which deals with the questions arising in the case with such fullness and clearness as to make it seem unnecessary to add anything thereto, but, by way of furnishing the Court with the authorities referred to in the opinion without specific identification it is deemed

due to the Court to add to the opinion the following suggestions:

1. That the bequest to the testator's wife of his life insurance was a specific legacy only to be satisfied by the delivery of the thing itself bequeathed, and that when assented to by the executors—and respecting such assent in this case there is no possible room for doubt—the same was vested in the testator's widow as of the time of his death, the Court's attention is asked to the following, in addition to the cases cited by the Justice below:

18 Ency. Law (2d Ed.), 714-15, 790;
 11 Ency. Law (1st Ed.), 1160-1;
 Proctor v. Robinson, 35 Mich., 284;
 Mayo v. Bland, 4 Md. Ch. 376.

2. That where an estate is given in one clause of a will in clear and decisive terms, the estate so given can not be taken away or cut down by any subsequent clause that is not as clear and decisive as the one by which the estate is given, is established beyond question by the following authorities:

29 Ency. Law (1st Ed.) 369;
 Ranfield v. Ranfield, 8 H. L. Cas. 224;
 Sweet v. Chase, 2 N. Y. 73;
 Criswold v. Warner, 51 Hun. 12;
 Roseboom v. Roseboom, 81 N. Y. 356;
 Proctor v. Robinson, 35 Mich. 284;
 In re Est. Mary Biddle, 28 Pa. St. 59;
 Ramsdell v. Ramsdell, 21 Me. 288;
 Price v. Cole, 2 S. E. Rep. 200;
 Burbank v. Whitney, 24 Pick. 146;
 Potter v. Converse, 143 Mass. 189;
 Roth v. Raushchenbusch, 61 L. R. A. 455;
 Webb v. Lines, 57 Conn. 154;
 Bills v. Bills, 80 Iowa, 269;

Collins v. Collins, 40 Oh. St. 353;
 Wicker v. Ray, 118 Ill. 472;
 Sturgis v. Work, 122 Ind. 134;
 White v. Crenshaw, 5 Mack. 113;
 Snyder v. Baker, 5 Mack. 443;

3. The internal evidence of the will and codicil, which were written by the testator himself, is all one way, and is conclusive to the effect that the testator meant his wife to have his life insurance absolutely.

Thus, the testator's language plainly distinguishes estates for life, absolute estates and estates in trust. The devise of the real estate is in terms for life; the bequest in the codicil to the testator's brother for his nephew is in terms in trust; and the bequest to the testator's wife of his life insurance is without any qualification whatever. Moreover, the testator clearly used the expression "disposed of" as equivalent to the word "mentioned." This is clear from the fact that the bequest to his wife of his life insurance and all other property, being coupled with the words "not otherwise disposed of by this will," would, under any other construction, operate as a residuary devise and bequest, whereas the will contains a separate clause in the nature of a residuary disposition, namely, that providing that after his wife's death the property taken by her for life should revert to the testator's brother.

Again, the language of the clause which is in the nature of a residuary clause is unique. It is as follows: "At the death of my wife, Emma V. Montgomery, *all* of my property, real, personal and mixed, shall revert to my brother, Winfield Scott Montgomery, and his heirs forever."

This can not be read literally, for if it were it would convert every gift made by the will into a gift for the life of his wife. This would defeat the plain intent of the testator as to the bequests of his books, his watch and chain, and

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This can not be read literally, for if it were it would convert every gift made by the will into a gift for the life of his wife. This would defeat the plain intent of the testator as to the bequests of his books, his watch and chain, and

\$200 in money, which last was expressly made to aid his nephew in his education.

And, again, as the devise of the real estate for life and the legacies are specific and particular, and the devise and bequest to the brother general, the testator intended clearly to give his brother by way of remainder only so much of his estate as was left for the will to operate upon after satisfying the specific and particular devise and legacies. Upon this point, the language of the Court of Appeals of New York, in *Roseboom v. Roseboom*, 81 N. Y., 356, 359, is especially appropriate:

“So considered, the provisions of the will harmonize and each has full effect. The residuary clause is not repugnant to the prior gift, and the devise may take effect according to its terms. We thus follow the rule which requires a will to be so construed as to avoid, if possible, all repugnancy and give effect to all its language. We have here no occasion to depart from it; the two clauses are not irreconcilable, and there is no occasion, therefore, to reject one in order to uphold the other—a desperate remedy, and to be resorted to only in case of necessity—so that one, rather than both, provisions should fail.”

And, also, the case of *Price v. Cole*, above cited, is here especially in point, inasmuch as the specific bequest of the life insurance, not being again mentioned in the will, there is lacking all room for contention that there is any clause subsequent to the clause making the bequest that can by any possibility be said to be as clear and decisive in taking away or cutting down the bequest as is the bequeathing clause itself in making it.

And, finally, the difference in the language used by the testator in devising his real estate and that used by him in

bequeathing his life insurance is significant in the highest degree. He gives his real estate to his wife for life, with power to mortgage it in case of necessity, whereas he gives the life insurance without any qualification or limitation. Having in mind the possible necessities of his wife, he gives her the power, to the detriment of his brother and heir, to decrease what would be the inheritance by the amount of any incumbrance which the wife might deem it proper to make, and, having clearly in mind this contemplated necessity on her part, he distinctly avoids doing what would have been the most natural thing had he contemplated giving her a life estate only in the insurance, namely, providing for its investment and the use of the income, with resort to an incumbrance of the real estate only in case such income should prove insufficient for his wife's support. Had it been the testator's intention to limit his wife's right in the life insurance to a life estate, his will would have provided in effect as follows: "I give to my wife my life insurance and my real estate each for life, to be used by her as follows: The life insurance to be invested and the income thereof to be used by her; in case such income shall prove insufficient for her needs, I give her the power to use so much of the principal of the insurance money as she may find necessary, and, in case the income, and afterwards the principal, of the insurance money shall prove insufficient, then, and in that event, I give her the right to mortgage the real estate." Instead of making this very simple provision, which, in view of the testator's clear consideration of his wife, is the very least he would have done had he contemplated limiting her primary interest in the life insurance to a life estate, the only provision which he made for the support of his wife by way of loan or investment is that concerning the real estate, which, in view of his devise of it over to his brother, it is plain it was his intention not to have encroached upon except in case of absolute necessity—that is, in case the pro-

vision made for his wife by the bequest of the life insurance should prove unequal to her needs.

III.

Should the Court be of opinion that the construction of the will herein contended for and the decree of the Court below in that behalf are erroneous, attention is asked to the matters set forth in paragraphs 11, 12 and 13 of the answer.

The allegations of these paragraphs show that the testator's widow paid on account of his debts and the administration of his estate sums aggregating not less than \$1,765.11, by reason of which the amount of his life insurance was greatly reduced below the sum of \$4,500 alleged to have been invested by her in the certain notes which it is the object of the bill to have decreed to be the property of the appellant. This, taken in connection with the fact that the widow had a large separate estate, takes all point from the statement of the learned Justice below in his opinion (Rec. 46, Fol. 135), that "The testimony of the complainant has traced the fund in question as distinctly as can be reasonably required of him, and, if it were true that the moneys derived from this insurance and deposited on the dates mentioned in the three specific banks mentioned did not actually go into these notes, it was for the defendants to show it."

The only testimony in support of this conclusion is of one witness to the effect that the widow said that she intended to invest \$4,500 of the money obtained on the life insurance and that afterwards she said that she had invested \$3,500 of it, and was expecting soon to invest \$1,000 more in similar manner. (Rec. 18). The proffered testimony of the appellant on this point (Rec. 21), is, of course, incompetent as purporting to be in the form of a statement by a deceased to a suitor against her administrator. There is no testimony directly tracing the insurance money to the notes in

question, and the only legitimate effect of the testimony on the point is, that, having declared her intention of making an investment out of the insurance money and having a separate estate of her own, and having, out of all her means, invested the amount represented by the notes, notes of the aggregate amount in question were found among the widow's effects after her death. It may well be that, having mingled the insurance money with her own funds, her declarations meant nothing more than that her investment was intended to be and was of the amount in question as on account of what had come to her through her husband's life insurance. This is far from such an identification of the money as subjects it to the usual rule which obtains when specific funds are traced from place to place. In this view of the case, the appellee's remedy was clearly at law.

And, in any event, assuming the appellant's remedy rightly conceived, the case, by the pleadings, should, on the hypothesis under consideration and in view of all the facts, be converted into one of administration of a decedent's estate; and, at the utmost, if the Court should be of the opinion that the decree below should be reversed, the case should be remanded with directions for proper proceedings to state an account as in administration of the testator's estate.

Respectfully submitted,

HENRY E. DAVIS,

HARRY SMITH,

For the Appellees.

